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# Corporate Deferred Prosecution as Discretionary Injustice

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# CORPORATE DEFERRED PROSECUTION AS DISCRETIONARY INJUSTICE

Peter R. Reilly\*

## *Abstract*

*A recent federal appellate court ruling of first impression permits the resolution of allegations of serious corporate criminal wrongdoing by way of an Alternative Dispute Resolution mechanism called Deferred Prosecution, without appropriate judicial review. This Article describes why this ruling is ill-advised, and suggests how other courts might address these same legal issues while arriving at different conclusions. This Article argues that if federal prosecutors are going to continue using Deferred Prosecution Agreements (“DPAs”) in addressing allegations of corporate criminal misconduct, then that discretionary power must be confined and checked through meaningful judicial review. The overriding concern with the appellate court ruling is that if the law surrounding corporate DPAs is permitted to develop on its current course, federal prosecutors will continue to use these agreements in a discretionary manner that both subordinates public interest and undermines separation of power principles.*

## I. INTRODUCTION

On February 5, 2015, U.S. District Judge Richard J. Leon did something no federal judge has ever done before: he outright rejected a Deferred Prosecution Agreement (“DPA”) the federal government had successfully negotiated with a corporate defendant. In *United States v. Fokker Services, B.V.* (“*Fokker I*”),<sup>1</sup> Judge Leon declined to approve a DPA—a negotiated contract between the federal government and defendant Fokker Services which, conditioned upon the defendant’s satisfactory fulfillment of various agreed-upon provisions, would normally result in the charges being dismissed and the case being closed. In rejecting the DPA, Judge

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\* © 2017 Peter R. Reilly. Associate Professor of Law, Texas A&M University School of Law. Harvard Law School (J.D.); Georgetown University Law Center (LL.M.); Hewlett Fellow in Conflict Resolution and Legal Problem-Solving, Georgetown University Law Center (2002–2005). I am grateful for the feedback I received at the 2016 AALS ADR Works-in-Progress Conference held at Marquette University Law School. For helpful input I also wish to give special thanks to Cynthia Alkon, Susan Ayres, Colleen Baker, Kathleen Flacy, Brandon Garrett, Ronald Krotoszynski, William Magnuson, Carrie Menkel-Meadow, Mary Miller, Lauren Newell, Richard Reuben, Lisa Rich, Omer Shapira, Andrea Schneider, Jean Sternlight, Will Thomas, and Nancy Welsh. Finally, I wish to thank the extremely helpful and able editors of the Utah Law Review for their contribution to this project. All errors are my own.

<sup>1</sup> *United States v. Fokker Services B.V. (Fokker I)*, 79 F. Supp. 3d 160 (D.D.C. 2015), *vacated*, 818 F.3d 733, 747 (D.C. Cir. 2016).

Leon said the agreement was “grossly disproportionate to the gravity” of the offending behavior,<sup>2</sup> concluding: “it would undermine the public’s confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time . . . .”<sup>3</sup>

The case was appealed. Fourteen months later in *United States v. Fokker Services B.V. (Fokker II)*, a case of first impression, the appellate court vacated Judge Leon’s ruling and said the district court had “significantly overstepped its authority” in rejecting the DPA.<sup>4</sup> Four attorneys in a leading U.S. law firm describe the appellate court’s holding of the *Fokker II* ruling as follows:

Relying upon the Separation of Powers doctrine, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously held, in no uncertain terms, that district court judges are not empowered to reject deferred prosecution agreements (“DPAs”) because they disagree with the prosecutors’ charging decisions or elements of the agreement.<sup>5</sup>

In other words, under the *Fokker II* regime, if a federal prosecutor offers a DPA to a corporate defendant—even a highly sophisticated party alleged to have engaged in serious criminal misconduct—and the defendant agrees to abide by the terms of that deal, a district court can almost never reject the agreement based on its substantive terms. In effect, the prosecutor has employed the use of an Alternative Dispute Resolution mechanism—a DPA—to resolve the matter without meaningful judicial review.

This outcome raises the following question: to what extent, if any, is a federal district court empowered to reject a DPA? In other words, to what extent are the agreement provisions that form DPAs subject to judicial review, if at all, given the statutory directives and constitutional constraints pertaining to the agreements?

This Article argues the ruling in *Fokker II* provides prosecutors too much unfettered discretion in their use of DPAs. As Professor Kenneth Davis warns in his seminal work, *Discretionary Justice: A Preliminary Inquiry*:<sup>6</sup> Although “[e]liminating discretionary power would . . . stifle individualized justice,”<sup>7</sup> such power “should be properly confined, structured, and checked.”<sup>8</sup> In describing various weaknesses within the ruling in *Fokker II*, this Article thereby suggests to readers that courts facing similar cases should rule in a different manner.

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<sup>2</sup> *Id.* at 167.

<sup>3</sup> *Id.*

<sup>4</sup> *United States v. Fokker Services B.V. (Fokker II)*, 818 F.3d 733, 747 (D.C. Cir. 2016).

<sup>5</sup> Mark A. Rush et al., *BNA Insights: Imbalance of Power: Federal Prosecutors’ Nearly Unilateral Discretion to Resolve Allegations of Corporate Misconduct After D.C. Circuit Panel Overrules District Court’s Rejection of Deferred Prosecution Agreement in U.S. v. Fokker*, 48 SEC. REG. & L. REP. 1005, 1005 (2016).

<sup>6</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

<sup>7</sup> *Id.* at 217.

<sup>8</sup> *Id.* at 216.

In building this case, Part II gives a brief history of DPAs and discusses the advantages and disadvantages of using them in corporate matters. Part III describes, based upon legislative history, how employing DPAs to resolve allegations of corporate criminal misconduct goes far afield from the Congressionally-intended purpose of using the agreements to promote the *social rehabilitation* of a narrow category of disadvantaged *individuals* whose social and economic profiles contrast starkly with those of corporate entities and the white collar professionals who run them. Parts IV and V analyze the federal rulings (three district court opinions and one appellate court opinion) that directly address judicial review of corporate DPAs during the approval process. Finally, Part VI presents the conclusion by offering a summary of arguments regarding why both Congress and other courts should now work to redirect the flawed legal course on which DPAs have been set via the D.C. Circuit Court of Appeals decision in *Fokker II*.

## II. CORPORATE DPAS IN CONTEXT

DPAs “have become a mainstay of white collar criminal law enforcement.”<sup>9</sup> Indeed, Professor Julie O’Sullivan calls their increased use part of the “biggest change in corporate law enforcement policy in the last ten years.”<sup>10</sup> Since the government began using them in the corporate context in the early 1990s, hundreds have been employed to settle allegations of misconduct—and with some of the country’s most well-known corporate entities, including America Online, Boeing, General Electric, JPMorgan, Johnson & Johnson, and Sears.<sup>11</sup> The agreements have been used to address many different kinds of matters—including various fraud and trade offenses, as well as allegations of wrongdoing under the False Claims Act, the Controlled Substances Act, the Foreign Corrupt Practices Act, and the Food, Drug & Cosmetic Act.<sup>12</sup>

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<sup>9</sup> Lanny A. Breuer, Assistant Attorney Gen., Dep’t of Justice, Address at the New York City Bar Ass’n (Sept. 13, 2012), <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association> [https://perma.cc/4APU-DE3Q].

<sup>10</sup> Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What that Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 77 (2014).

<sup>11</sup> BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 47–48 (2014).

<sup>12</sup> 2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), GIBSON DUNN (July 9, 2013), <http://www.gibsondunn.com/publications/Pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx> [https://perma.cc/AJK5-CWV3].

A good deal of scholarship has been published regarding both the positive<sup>13</sup> and negative<sup>14</sup> aspects of DPAs. On one hand, some suggest that DPAs can successfully: (1) enable the parties to resolve the matter quickly and efficiently, without the time and expense involved in a traditional prosecution and trial;<sup>15</sup> (2) mandate corporate compliance and internal reform measures—including “broad and far-reaching corporate governance changes” to business structures, boards, and senior management;<sup>16</sup> (3) impose monetary penalties and restitution;<sup>17</sup> (4) require companies to fund their own internal investigations and, in some cases, to hire an independent monitor to ensure effective implementation of the DPA agreement;<sup>18</sup> (5) help companies avoid collateral consequences that can sometimes flow from federal indictments (such as exclusion from government contracting), as well as avoid consequences to innocent third parties (such as employees or shareholders);<sup>19</sup> (6) require companies to acknowledge wrongdoing;<sup>20</sup> and (7) require companies to agree to cooperate with government investigations.<sup>21</sup>

On the other hand, using DPAs remains controversial because some suggest that: (1) their use results in the prosecution of fewer *individuals* (as opposed to

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<sup>13</sup> See, e.g., Connor Bildfell, *Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases*, 20 CAN. CRIM. L. REV. 161, 163–65 (2016).

<sup>14</sup> See, e.g., Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 309 (2015).

<sup>15</sup> Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1458 (2007) (“[G]overnment prosecutors often have to tangle with well-financed defendants capable of hiring sophisticated law firms that can match government resources.”).

<sup>16</sup> Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 THE BUS. LAW. 61, 112 (2014).

<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 11 (Dec. 2009) <http://www.gao.gov/assets/300/299781.pdf> [<https://perma.cc/D6KV-UDAM>].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 37 (discussing the “negative consequences [resulting from criminal charges and convictions] for innocent third parties . . . including employees, pensioners, shareholders, creditors, customers, and the general public”).

<sup>20</sup> Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 57 SEC. REG. INST. 817, 824 (2005) (explaining that DPAs can include “some sort of acknowledgement of responsibility or stipulations of facts as the government sees them,” as well as “an agreement not to publicly dispute the acknowledgment or stipulation, including in civil litigation”).

<sup>21</sup> David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013) (“The terms of the agreements are attractive to the government, because they often provide large penalties, far-reaching corporate compliance programs with outside monitors approved by the Department, and promises of cooperation by the companies involved.”).

entities) for corporate wrongdoing;<sup>22</sup> (2) the government has more bargaining power than target companies, leading to possible abuse and exploitation in negotiating and implementing the agreements;<sup>23</sup> (3) the government lacks the training and expertise to create the most appropriate DPA penalty and reform provisions;<sup>24</sup> (4) the use of DPAs has caused the government to focus too much on reforming and regulating corporate governance rather than prosecuting corporate criminal wrongdoing;<sup>25</sup> (5) using DPAs to address possible corporate criminal misconduct fails to conform to the rule of law;<sup>26</sup> (6) there are questions regarding whether DPAs effectively achieve the results and reforms envisioned by their proponents;<sup>27</sup> and (7) the DPA agreement process lacks transparency and fails to adequately involve the public and other interested parties.<sup>28</sup>

Whatever advantages and disadvantages there are to using DPAs in the corporate context, there are no signs suggesting the agreements might be legislatively or judicially ruled out of bounds in the near future.

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<sup>22</sup> Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014) (“[T]he failure to prosecute those responsible [for the Great Recession] must be judged one of the more egregious failures of the criminal justice system in many years.”).

<sup>23</sup> Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1434 (2007) (arguing that DPAs “provide prosecutors with a dangerous amount of leverage over the corporations they target, creating a bargaining imbalance and a new threat of abuse”).

<sup>24</sup> See, e.g., Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 112 (2007) (“[P]rosecutors, who now—often with little or no experience in corporate governance matters—are solely charged with evaluating whether a company’s compliance program is adequate.”).

<sup>25</sup> Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008).

<sup>26</sup> Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 227 (2016).

<sup>27</sup> Reilly, *supra* note 14, at 345 (discussing assessments by the U.S. Government Accountability Office and the Organisation for Economic Co-operation and Development suggesting that “the DOJ is neither in a position to evaluate the effectiveness of DPAs nor to measure how much such agreements lead to real and lasting corporate reform”).

<sup>28</sup> Bildfell, *supra* note 13, at 180 (“[T]he DPA process does not include any outside parties; it is a negotiation behind closed doors, to which only the prosecutor and company are invited. This leaves employees, community representatives, shareholders, and others out in the cold.”).

### III. SHOULD DPAS BE USED FOR CORPORATE MATTERS?

Congress passed the Speedy Trial Act<sup>29</sup> to ensure a judicial system “in which cases are disposed of with reasonable dispatch, whether or not prosecutors or defendants perceive speed as being in their interest.”<sup>30</sup> To achieve this goal, Congress imposed time limits associated with prosecuting a case. For example, the Act states that a defendant’s trial must begin within seventy days after the government files an information or indictment.<sup>31</sup> The Act also allows for certain exclusions from that seventy day limit, such as “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct.”<sup>32</sup> It is that particular exemption—18 U.S.C. § 3161(h)(2)—which enables the government to resolve cases using DPAs.

Although the government has been using DPAs to resolve allegations of corporate misconduct since 1994,<sup>33</sup> it is important to note that the Section 3161(h)(2) exclusion provision was designed, according to the Senate Committee Report, with the idea of “pretrial diversion or intervention programs in which prosecution of a *certain category of defendants* is held in abeyance on the condition that the defendant participate in a *social rehabilitation program*.”<sup>34</sup> The Committee Report goes on to state that “[i]f the defendant succeeds in the program, charges are dropped.”<sup>35</sup>

The Report notes that such diversion programs “have been quite successful with first offenders”<sup>36</sup> and points specifically to the Manhattan Court Employment Project in New York City (which targeted mostly unemployed people, ages sixteen to forty-five, and assisted them with counseling, social services, job training, job placement, and remedial education services)<sup>37</sup> and the Project Crossroads program

<sup>29</sup> 18 U.S.C. §§ 3161–3174 (2008).

<sup>30</sup> ANTHONY PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 34 (1980). (Note that the legislative history of the Speedy Trial Act is found in numerous reports—including S. Rep. No. 96-212 (1979); H.R. Rep. No. 96-390 (1979), reprinted in 1979 U.S. Code Cong. and Ad. News 805; S. Rep. No. 93-1021 (1974); H.R. Rep. No. 93-1508 (1974), reprinted in 1974 U.S. Code. Cong. and Ad. News 7401. These reports are all contained in Anthony Partridge’s single volume legislative history of the Act, published by the Federal Judicial Center in 1980).

<sup>31</sup> 18 U.S.C. § 3161(c)(1) (2008).

<sup>32</sup> *Id.* § 3161(h)(2) (emphasis added).

<sup>33</sup> In 1994, Mary Jo White, then the United States Attorney for the Southern District of New York, used a DPA to resolve a matter involving Prudential Securities. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1873 & n.66 (2005).

<sup>34</sup> PARTRIDGE, *supra* note 30, at 117 (emphasis added).

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> *The Manhattan Court Employment Project*, VERA INST. OF JUSTICE 1–7 (1970).

in Washington, D.C., (which provided similar services to similar populations, but targeted people between the ages of sixteen and twenty-six)<sup>38</sup> as examples of successful programs, adding, “[s]ome success has also been noted in programs where the defendant’s alleged criminality is related to a specific social problem such as prostitution or heroin addiction.”<sup>39</sup>

The central question courts now grapple with is: what did Congress mean when it used the phrase “with the approval of the court” in subparagraph 3161(h)(2) of the Speedy Trial Act? Does it mean that courts are permitted to review the agreement provisions of a DPA to assure that those deal points are reasonable and fair? Or does the phrase mean that courts are limited, as the court in *Fokker II* concluded, to the following far more narrow standard of review: “assur[ing] that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act’s time constraints.”<sup>40</sup> Courts will continue to grapple with this question; however, in the context of the Act’s legislative history, this question did not even *occur* to the members of Congress drafting the legislation. That is because when deferred prosecution is employed in the manner that Congress described and intended at the time of the bill’s passage, the resulting DPAs did not require the extensive set of agreement provisions found in the typical corporate DPA of today.<sup>41</sup>

It is difficult for courts to now attempt to interpret the statute’s words “with the approval of the court” within the context of a corporate DPA when analysis of the legislative history indicates that the language of the Section 3161(h)(2) exclusion provision was created for a specific group of defendants who were presented with *one* particular and specific DPA provision: whether to agree to attend, and try to succeed within, a *social rehabilitation program* that the government and court believed would successfully address the defendant’s social, educational, and employment problems.

Undergirding everything else presented in this Article is the proposition that, as creative as it might be to employ DPAs in the corporate context, it is questionable whether it is legitimate to do so. Legally, it has been suggested the government can continue using DPAs in this context because Congress never specifically *forbade*

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<sup>38</sup> ROBERTA ROVNER-PIECZENIK, NAT’L COMM. FOR CHILDREN AND YOUTH, PROJECT CROSSROADS AS PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION 1–2 (1970).

<sup>39</sup> PARTRIDGE, *supra* note 30, at 117.

<sup>40</sup> *Fokker II*, 818 F.3d 733, 744 (D.C. Cir. 2016).

<sup>41</sup> Typically, DPAs require corporate entities to (1) cooperate with the government’s investigation of possible wrongdoing; (2) create new (or enhance existing) internal policies and programs to ensure compliance with the law; (3) pay a fine or penalty; (4) admit wrongdoing; (5) hire an independent “monitor” to ensure the successful implementation of all DPA provisions; (6) waive speedy trial rights and statute of limitations defenses; and (7) agree to a provision prohibiting any sort of denial of the “Statement of Facts” appended to the agreement. Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 18–19 (2006); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 47 (2010).



their use for such purposes. For example, the court in *United States v. Saena Tech Corp.*<sup>42</sup> suggested that DPAs are not “legally improper” because “Congress provided the deferred-prosecution tool without limiting its use to individual defendants or to particular crimes.”<sup>43</sup> However, if prosecutors had begun using DPAs to address alleged corporate misconduct immediately after the Speedy Trial Act’s passage in 1974—rather than waiting two decades to do so—Congress members likely would have pushed back and put a stop to it. This is because the circumstances of corporate entities (and their directors, officers, managers, etc.) are not at all comparable to the circumstances of the socially and economically disadvantaged individuals who make up the “certain category of defendants” that Congress specifically targeted for assistance through deferred prosecution.<sup>44</sup>

#### IV. JUDICIAL REVIEW OF CORPORATE DPAS

Part IV briefly summarizes the federal court cases that directly address judicial review of corporate DPAs during the approval process. Although all three federal district courts (issuing rulings in *HSBC*, *Fokker I*, and *Saena Tech Corp.*) reasoned they would be permitted to conduct a meaningful review of the DPAs set before them, the one appellate court (the D.C. Circuit Court of Appeals considering the *Fokker II* matter) ruled that district courts are limited to conducting DPA reviews that are far narrower in scope.

##### A. *United States of America v. HSBC Bank USA, N.A.*<sup>45</sup>

On December 11, 2012, the government charged HSBC Bank USA, N.A. with various violations of the Bank Secrecy Act, including failing to maintain an effective anti-money laundering program.<sup>46</sup> The government also charged HSBC Holdings PLC with facilitating various financial transactions that violated both the International Emergency Economic Powers Act and the Trading with the Enemy Act.<sup>47</sup> The same day, the government also filed a DPA and asked the court to hold the case in abeyance for five years pursuant to the terms of the agreement.<sup>48</sup> The DPA stated that if the defendants complied with the provisions of the agreement, the government would move to dismiss all charges after five years.<sup>49</sup>

Judge Gleeson argued that the court’s “supervisory power” gave him the authority to “approve or reject” the DPA.<sup>50</sup> He cited several U.S. Supreme Court

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<sup>42</sup> 140 F. Supp. 3d 11 (D.D.C. 2015).

<sup>43</sup> *Id.* at 42.

<sup>44</sup> PARTRIDGE, *supra* note 30, at 117.

<sup>45</sup> *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

<sup>46</sup> *Id.* at \*1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*3–4.

cases to support the proposition that “[o]ne of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings.”<sup>51</sup>

The court pointed out that rather than opting for a Non-Prosecution Agreement (“NPA”)<sup>52</sup> or a Rule 48(a) motion to dismiss, the parties instead decided to resolve the matter by using a DPA.<sup>53</sup> The court explained that although the choice might “produce a public relations benefit for the government,”<sup>54</sup> it also placed a criminal matter onto the court’s docket, thereby “subject[ing] their DPA to the legitimate exercise of [the] court’s authority.”<sup>55</sup>

The court posited that by arranging for the implementation of a DPA “within the confines of a pending case,” the parties were asking for the court’s “judicial imprimatur,” thereby leading the court to “exercise its supervisory authority over the DPA.”<sup>56</sup> Although the judge conceded that exercising such authority in the DPA context was “novel,” he said it was “easy to imagine” many different situations where the agreement or its implementation “so transgress[] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court.”<sup>57</sup>

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<sup>51</sup> *Id.* at \*4. Among other cases, the *HSBC I* Court cited to *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980) (“[T]he supervisory power serves the ‘twofold’ purpose of deterring illegality and protecting judicial integrity.”) (internal quotation marks omitted), and to *United States v. Hasting*, 461 U.S. 499, 526 (1983) (“[Our] cases have acknowledged the duty of reviewing courts to preserve the integrity of the judicial process.”). *Id.* (internal quotation marks omitted).

<sup>52</sup> See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep’t of Justice, on the Selection and Use of Monitors in Deferred Prosecution Agreement and Non-Prosecutions Agreements with Corporations to Heads of Dep’t Components & U.S. Attorneys 1 n.2 (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf> [<https://perma.cc/3VHY-S6M6>] (explaining that a DPA “is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the [NPA] context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.”).

<sup>53</sup> See *HSBC I*, 2013 WL 3306161, at \*5.

<sup>54</sup> *Id.* The judge also quotes from a press release issued by the government in the matter, which stated “[t]oday’s historic agreement, which imposes the largest penalty in any BSA prosecution to date, makes it clear that all corporate citizens, no matter how large, must be held accountable for their actions.” *Id.* at \*5 n.8 (quoting Press Release, U.S. Dep’t of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html> [<https://perma.cc/CA7Z-HB2X>]).

<sup>55</sup> *Id.* at \*5.

<sup>56</sup> *Id.* at \*6.

<sup>57</sup> *Id.* at \*6. The judge elaborated, saying that DPA requirements for the defendant to cooperate fully with the government in ongoing investigations could potentially lead to the violation of “a company’s attorney-client privilege and work product protections, or its employees’ Fifth or Sixth Amendment rights.” *Id.*

The court said it would approve the DPA, but the approval would be “subject to a continued monitoring of its execution and implementation.”<sup>58</sup> The court spoke of the “[s]ignificant deference . . . owed the Executive Branch in matters pertaining to prosecutorial discretion”<sup>59</sup> and made it clear that a district court judge should be quite deferential to the decision to enter into a DPA.<sup>60</sup>

The DPA required a corporate monitor to ensure that HSBC was implementing various remedial measures,<sup>61</sup> as well as complying with the laws it had initially broken. The court explained that so long as the case was “on its docket, the Court retains the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court.”<sup>62</sup> With that, the parties were instructed to file quarterly reports to keep the Court “apprised of all significant developments in the implementation of the DPA.”<sup>63</sup>

B. United States of America v. Fokker Services B.V. (*Fokker I*)<sup>64</sup>

On June 5, 2014, the government charged Fokker Services B.V. (“Fokker”) with “one count of Conspiracy to Unlawfully Export U.S.-Origin Goods and Services to Iran, Sudan, and Burma.”<sup>65</sup> The conspiracy, spanning five years from 2005–2010, included more than 1,100 illegal shipments of components for aircraft systems and complex navigation systems; for national security reasons, the shipments were subject to various export control laws.<sup>66</sup> The majority of company misconduct involved Iranian customers,<sup>67</sup> and shipments to Iran continued despite warnings to senior management (from both in-house counsel and a company compliance manager handling export issues) that the shipments were illegal.<sup>68</sup> Moreover, the Factual Statement submitted in the case “makes clear that certain policies and practices were carried out with the knowledge and approval of senior management.”<sup>69</sup>

On the same day the company was charged, the government filed a DPA, along with a motion to exclude time under the Speedy Trial Act.<sup>70</sup> Under the DPA, Fokker

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<sup>58</sup> *Id.* at \*7.

<sup>59</sup> *Id.* at \*8.

<sup>60</sup> *Id.* at \*11.

<sup>61</sup> *Id.* at \*10. This included placing new people into key positions within both HSBC North America and HSBC Holdings, addressing lack of accountability in various compliance programs, restructuring senior executive bonus systems so that bonuses would be tied to meeting compliance goals and standards, etc. *Id.*

<sup>62</sup> *Id.* at \*11.

<sup>63</sup> *Id.*

<sup>64</sup> 79 F. Supp. 3d 160 (D.D.C. 2015).

<sup>65</sup> *Fokker I*, 79 F. Supp. 3d at 161 (citations omitted).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 163.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

would acknowledge responsibility for violating the law and the government would agree to dismiss all charges if the company complied with all the terms of the DPA for a period of eighteen months.<sup>71</sup> Those agreement terms included the following: the company would pay a fine, continue to cooperate with the government, implement enhanced compliance policies, and comply with all U.S. export laws.<sup>72</sup>

The presiding judge was Judge Richard J. Leon of the United States District Court for the District of Columbia, who opined, “[t]he plain language of the statute calls for court approval, and it is this approval the parties now seek.”<sup>73</sup> The parties argued the court’s role was “extremely limited” in such circumstances and the court should approve the DPA “unless there is an indication that (a) the defendant did not enter into the agreement willingly and knowingly, . . . or (b) the agreement was designed solely to circumvent Speedy Trial Act limits.”<sup>74</sup>

The court disagreed and said that “a District Court has the authority ‘to approve or reject the DPA pursuant to its supervisory power.’”<sup>75</sup> Indeed, the court observed, “it is that ‘supervisory power . . . [that] permits federal courts to supervise the administration of criminal justice among the parties before the bar.’”<sup>76</sup> The judge explained that one important purpose of a court’s supervisory powers “is to protect the integrity of the judicial process,” and he quoted Judge Gleeson’s proposition from *HSBC* that “[t]he inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety.”<sup>77</sup> Finally, the court reasoned that although the DPA matter at bar was not a “typical case” for using such supervisory powers, the court must consider both the defendant *and* the public in making its ruling.<sup>78</sup> “After all,” the court observed, “the integrity of judicial proceedings would be compromised by giving the Court’s stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct.”<sup>79</sup>

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<sup>71</sup> *Id.* at 164.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citations omitted).

<sup>75</sup> *Id.* at 165 (quoting *HSBC I*, No. 12-CR-763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013)).

<sup>76</sup> *Id.* (quoting *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (internal quotation marks omitted)).

<sup>77</sup> *HSBC I*, 2013 WL 3306161, at \*6.

<sup>78</sup> *Fokker I*, 79 F. Supp. 3d at 166.

<sup>79</sup> *Id.*

The court made it clear that the government “has the clear authority *not* to prosecute a case,”<sup>80</sup> and it could have gone that route by using a Non-Prosecution Agreement or by not filing charges at all.<sup>81</sup> However, the government decided instead to file charges against the company and to use a DPA to resolve the matter, leaving the criminal case “on [the] Court’s docket for the duration of the agreement’s term.”<sup>82</sup>

The court explained that the parties were asking it “to lend its judicial imprimatur”<sup>83</sup> to the DPA, thereby making the court an “instrument[] of law enforcement.”<sup>84</sup> Noting the parties would want to “us[e] the full range of the Court’s powers” if the company failed to comply with the DPA, the court said: “[t]o put it bluntly, the Court is thus being asked to serve as the leverage over the head of the company.”<sup>85</sup>

The court suggested that the terms of the DPA (i.e., having to pay a fine, continue to cooperate, and adhere to an eighteen-month probationary period) were too lenient.<sup>86</sup> It expressed particular surprise that “under the DPA no individuals are being prosecuted for their conduct” and that some employees who engaged in misconduct were permitted to stay with the company, albeit with demotions, duty reassignments, and increased training requirements.<sup>87</sup> The court also complained the DPA required neither that an independent monitor be employed to supervise the probationary period, nor that the company provide periodic reports to the court or government to apprise them of strides being made to comply with the law.<sup>88</sup> “As such,” the judge opined, “the Court is being left to rely solely on the self-reporting of Fokker Services. One can only imagine how a company with such a long track record of deceit and illegal behavior ever convinced the Department of Justice to agree to that!”<sup>89</sup>

After reviewing the entire DPA, the court stated:

I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services’ conduct in a post-9/11 world. In my judgment, it would undermine the public’s confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country’s worst enemies.<sup>90</sup>

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<sup>80</sup> *Id.* at 165 (citation omitted).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (internal quotation marks omitted) (citation omitted).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 166.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 167.

The court concluded by observing that the DPA “does not constitute an appropriate exercise of prosecutorial discretion” and would be rejected.<sup>91</sup> The court added, “[t]o be clear, . . . I am not ordering or advising the Government, or the defendant, to undertake or refrain from undertaking any particular action—I am merely declining to approve the document before me.”<sup>92</sup> The court made it clear that it would be happy to consider a “modified version” of the DPA if the parties wanted to try again for approval in the future.<sup>93</sup>

C. United States of America v. Saena Tech Corporation; United States of America v. Intelligent Decisions, Inc.<sup>94</sup>

Two separate cases involving DPAs (*Saena Tech Corp.* and *Intelligent Decisions*) were pending before the court, so both cases were addressed in the same ruling. In *Saena Tech Corp.*, the government charged the company on March 24, 2014, with bribing a public official.<sup>95</sup> The following month the government filed a joint motion for approval of a DPA, as well as exclusion of time under the Speedy Trial Act.<sup>96</sup> In *Intelligent Decisions*, the government charged the organization on October 15, 2014, with paying a gratuity to a public official.<sup>97</sup> Two weeks later the government filed a joint motion for approval of a DPA, as well as exclusion of time under the Speedy Trial Act.<sup>98</sup>

As the matter was unfolding, the court noted “the case was ‘nontraditional’ in that ‘[t]here’s no one else in the courtroom raising concerns’ and ‘the Court cannot be an advocate.’”<sup>99</sup> Thus, the court appointed Professor Brandon Garrett from University of Virginia School of Law and Dean Alan Morrison from The George Washington University Law School as amicus curiae to ensure a more adversarial process and to help the court determine if it would be fair and reasonable to use DPAs to resolve both cases at bar.<sup>100</sup>

The court conducted a review of the legislative history of the Speedy Trial Act and concluded that the history “demonstrates that Court involvement in the deferral of a prosecution was specifically intended by Congress when it passed this legislation.”<sup>101</sup> The court noted that although the requirement of court approval to exclude time under U.S.C. Section 3161(h)(2) “implies that the court must place its

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 140 F. Supp. 3d 11 (D.D.C. 2015).

<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 21.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 19 (citation omitted).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 25.

formal imprimatur on the agreement,”<sup>102</sup> the statute’s language nevertheless failed to “grant the Court plenary power to review the agreement.”<sup>103</sup> After analyzing the “arguably ambiguous text” of the statute, the court decided “that its authority under the Speedy Trial Act is limited to assessing whether the agreement is truly about diversion.”<sup>104</sup> However, the court made clear that despite that limited authority, the court could nevertheless engage in a “*limited* review of the fairness and adequacy of an agreement, to the extent necessary to determine the agreement’s purpose.”<sup>105</sup>

The court pointed out that if a DPA failed to contain any punitive provisions (like fines), and failed to include provisions to deter future crime (like mandating independent monitors and enhanced compliance programs), then that DPA was clearly not “designed to secure a defendant’s reformation” and therefore should be rejected.<sup>106</sup> The court posited that “[e]ven [a DPA] that contained *some* of these elements could be ineffective if the obligations were found to be so vague or minimal as to render them a sham.”<sup>107</sup> Accordingly, the court concluded that it retained “limited” authority under the Speedy Trial Act “to consider the terms of a [DPA] to determine whether they provide the defendant an opportunity to demonstrate good conduct while prosecution is deferred.”<sup>108</sup>

As previous courts had held, this court also concluded that it held supervisory powers concerning DPAs,<sup>109</sup> flowing from its “being asked to place its formal imprimatur on the [DPAs], to hold open two federal criminal cases, and to make various findings with respect to the Speedy Trial Act.”<sup>110</sup> The court then set forth what it determined to be the appropriate standard of review when a district court is considering approving or rejecting a DPA: the court must determine “(1) whether [the agreement] is truly intended to hold prosecution in abeyance while a defendant demonstrates rehabilitation, as required by the Speedy Trial Act; and (2) whether the agreement involves the Court in the type of illegal or untoward activity that might impugn the Court’s integrity.”<sup>111</sup> The court implied, however, that the standard might in fact not be that limited; the court said that since both cases at bar met this standard for approval, the court didn’t “have occasion to set forth the *full scope* of a district court’s authority to review and reject a [DPA],”<sup>112</sup> and “[n]othing in this Opinion should be interpreted to approve the judicial abdication of this review authority.”<sup>113</sup>

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<sup>102</sup> *Id.* at 29.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 30.

<sup>105</sup> *Id.* at 31.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 34.

<sup>110</sup> *Id.* at 33.

<sup>111</sup> *Id.* at 46.

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> *Id.*

Finally, the court explained that since both cases would remain pending on its docket, both companies would be required to file “periodic reports to update the Court” on how the agreement was being implemented.<sup>114</sup>

*D. United States of America v. Fokker Services B.V. (Fokker II)*<sup>115</sup>

The appellate court began its opinion by declaring, “[t]he [U.S.] Constitution allocates primacy in criminal charging decisions to the Executive Branch.”<sup>116</sup> The court opined that “it has long been settled” that the Judiciary can neither “second-guess” nor “impose its own . . . preferences” with respect to those decisions—including “decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought.”<sup>117</sup>

The court then observed that in certain situations, rather than pursue a criminal conviction or issue a declination, “the Executive may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement (DPA).”<sup>118</sup> The court explained that in the case at bar, appellant Fokker Services (“Fokker”) voluntarily disclosed to the government that it had potentially violated federal export control and other laws.<sup>119</sup> The government decided to dispose of the matter through the use of an eighteen-month DPA, under which Fokker would continue cooperating with the government, as well as implement “a substantial compliance program.”<sup>120</sup> On the same day the DPA was filed, the government filed criminal charges against Fokker,<sup>121</sup> along with a joint motion to exclude time under the Speedy Trial Act.<sup>122</sup> The appellate court stated: “[t]he district court denied the motion because, in [that] court’s view, the prosecution had been too lenient in agreeing to, and structuring, the DPA. Among other objections, the court disagreed with prosecutors’ decision to forgo bringing any criminal charges against individual company officers.”<sup>123</sup>

The appellate court vacated the district court’s ruling and stated:

We hold that the Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants. Congress, in providing for courts to approve the exclusion of time pursuant to a DPA,

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<sup>114</sup> *Id.* at 47.

<sup>115</sup> 818 F.3d 733 (D.C. Cir. 2016).

<sup>116</sup> *Id.* at 737.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 737–39. The one-count information, filed on June 5, 2014, charged Fokker with conspiracy to violate the International Emergency Economic Powers Act, 18 U.S.C. § 371; 50 U.S.C. § 1705. *Id.* at 739.

<sup>122</sup> *Id.* at 737.

<sup>123</sup> *Id.* at 737–38.



acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges.

In vacating the district court order, we have no occasion to disagree (or agree) with that court's concerns about the government's charging decisions in this case. Rather, the fundamental point is that those determinations are for the Executive—not the courts—to make.<sup>124</sup>

The court went on to explain that “[t]he Executive’s primacy in criminal charging decisions is long settled,” and cited numerous opinions supporting that proposition.<sup>125</sup> The appellate court noted that, “[c]orrespondingly, ‘judicial authority is . . . at its most limited’ when reviewing the Executive’s exercise of discretion over charging determinations.”<sup>126</sup> Thus, the appellate court said, “the Judiciary . . . generally is not ‘competent to undertake’ that sort of inquiry.”<sup>127</sup> “Indeed ‘[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.’”<sup>128</sup> The appellate court reasoned that such “settled principles counsel against interpreting statutes and rules in a manner that would impinge on the Executive’s constitutionally rooted primacy over criminal charging decisions.”<sup>129</sup>

The appellate court furthermore opined that the language of Section 3161(h)(2) “ties the ‘approval of the court’ requirement to the DPA’s ‘purpose of allowing the defendant to demonstrate his good conduct.’”<sup>130</sup> With such an understanding, the appellate court reasoned that a district court’s authority to approve an exclusion of time for a DPA has “a particular focus: i.e., to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act’s time constraints.”<sup>131</sup> The appellate court made no effort to define “the precise contours”<sup>132</sup> of a district court’s authority “to confirm that a DPA’s conditions are aimed to assure the defendant’s

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<sup>124</sup> *Id.* at 738.

<sup>125</sup> *Id.* at 741 (citations omitted).

<sup>126</sup> *Id.* (quoting *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986)).

<sup>127</sup> *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

<sup>128</sup> *Id.* (quoting *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)).

<sup>129</sup> *Id.* at 742.

<sup>130</sup> *Id.* at 744 (quoting 18 U.S.C. § 3161(h)(2) (2008)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

good conduct.”<sup>133</sup> However, the court stated that authority “*does not* permit the [district] court to impose its own views about the adequacy of the underlying criminal charges. Rather . . . those core charging decisions remain the province of the Executive.”<sup>134</sup>

The appellate court explained that it disagreed with the contention, put forth by amicus, that a district court’s review of a DPA under Section 3161(h)(2) is analogous to a court’s review of a plea agreement under Rule 11 of the Federal Rules of Criminal Procedure.<sup>135</sup> The appellate court observed that (1) trial judges “lack[] authority to reject a proposed [plea] agreement based on mere disagreement with a prosecutor’s underlying charging decisions[;]”<sup>136</sup> and (2) “trial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney.”<sup>137</sup>

The appellate court then concluded that the district court erred, and exceeded its authority, in denying the motion for exclusion of time under the Speedy Trial Act because “[t]here [was] no indication that the parties entered into the DPA to evade speedy trial limits rather than to enable Fokker to demonstrate its good conduct and compliance with the law.”<sup>138</sup> Instead, the appellate court said the district court criticized the government for not charging individuals within the company, for not requiring the company to pay a higher fine, and for not requiring an independent monitor to supervise the DPA<sup>139</sup>—all decisions falling under “the prosecution’s exercise of charging authority.”<sup>140</sup>

## V. ANALYSIS OF THE FOUR COURT OPINIONS

Part V attempts to undergird the Article’s core conclusions that prosecutors’ discretionary powers in using corporate DPAs should be confined and checked through meaningful judicial review, that the *Fokker II* ruling fails to ensure such review, and that future courts addressing similar legal issues might move in a direction different from that of *Fokker II*. The key propositions put forth in Part V include the following: First, a district court’s authority to review a corporate DPA is far more expansive than the *Fokker II* court held. Second, language within the Speedy Trial Act mandates court approval of the DPA deferral itself, along with the agreement terms that effectuate that deferral. Third, given that the form and function of DPAs have strong similarities to plea agreements, a district court’s review of a proposed DPA could be considered analogous to a court’s review of a proposed plea agreement under Rule 11 of the Federal Rules of Criminal Procedure. Fourth,

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<sup>133</sup> *Id.* at 744–45.

<sup>134</sup> *Id.* at 745 (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 745 (quoting *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973)).

<sup>138</sup> *Id.* at 746.

<sup>139</sup> *Id.* at 746–47.

<sup>140</sup> *Id.* at 742.

providing district courts the power to review DPA agreement terms in no way interferes with the government's complete and unfettered discretion with respect to charging decisions (i.e., *whether* to charge, *when* to charge, *whom* to charge, and *what charges* to bring or dismiss). And fifth, district courts have a long history of competently reviewing plea agreements and consent orders, and those courts are equally competent to review the agreement terms forming the basis of DPAs. Moreover, a critical role played by the court in all three forms of alternative dispute resolution (plea deals, consent orders, and DPAs) is to protect the public interest—especially in cases involving corporate entities, which can potentially cause serious public harm.

### A. Foundational Issues

The tension inherent in all four court opinions is vividly on display in the *HSBC* matter. On one hand, the *HSBC* district court said it is “easy to imagine” many different situations where a DPA agreement or its implementation “so transgress[] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court.”<sup>141</sup> Yet, on the other hand, the *HSBC* district court simultaneously said there is “[s]ignificant deference . . . owed the Executive Branch in matters pertaining to prosecutorial discretion,”<sup>142</sup> and thus a district court judge should be quite deferential “to the decision to enter into a [DPA].”<sup>143</sup> Because the *HSBC* district court *approved* that particular DPA, it did not have to confront the tricky issue of what would have happened if it had not done so. It seems there would have been a conflict between the court's supervisory powers to *reject* the agreement to protect the court's integrity, versus the government's prosecutorial discretion to *enter into* the agreement.

All three district courts—ruling respectively in the *HSBC*, *Fokker I*, and *Saena Tech Corp.* matters—agree that the court's supervisory power can be employed to protect the integrity of the court from problematic DPAs. As the *Fokker I* court put it: “the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct.”<sup>144</sup>

And although the *Saena Tech Corp.* court initially determined “that its authority under the Speedy Trial Act is limited to assessing whether the agreement is truly about diversion,”<sup>145</sup> the court later says its authority to review agreements under its supervisory powers expands its capabilities for DPA approval in certain regards. Specifically, the court states that a particularly “unfair or lenient”<sup>146</sup> DPA

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<sup>141</sup> *HSBC I*, No. 12-CR-763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013).

<sup>142</sup> *Id.* at \*7.

<sup>143</sup> *Id.* at \*8.

<sup>144</sup> *Fokker I*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015).

<sup>145</sup> *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 (D.D.C. 2015).

<sup>146</sup> *Id.* at 35.

agreement might “involv[e] the Court in something inappropriate” and could therefore be rejected.<sup>147</sup>

In this regard, the *Saena Tech Corp.* court seems to be having it both ways: the court said its authority is limited to determining whether agreements are truly about diversion, and yet the court said it could also *reject* agreements if it deemed them to be too harsh or too lenient. If the *Saena Tech Corp.* court had decided to reject the two DPA agreements set before it (instead of deciding to approve them both), the ruling probably would have met the same fate as the *Fokker I* case: the decision likely would have been appealed by the government along with the two defendant parties, all of whom supported judicial approval of the agreements.

### B. Scope of Authority

Central to all four court opinions is a determination of the scope of a federal district court’s authority to exclude the period of delay in the context of corporate DPAs. As stated earlier, the Speedy Trial Act states that a defendant’s trial must begin within seventy days after the government files an information or indictment.<sup>148</sup> Relevant here is the following exclusion provision: “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct.”<sup>149</sup>

In interpreting the provision, the *Fokker II* court ruled that a court’s approval authority for exclusion of time has a “particular focus: i.e., to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act’s time constraints.”<sup>150</sup> Thus, the appellate court said, a federal district court must “confine[] its inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct.”<sup>151</sup>

However, there are several arguments to support the contention that the review authority could in fact be interpreted as more expansive. First, in DPA agreements used to resolve matters in the decade leading up to the *Fokker I* case, the government *itself* consistently interpreted Section 3161(h)(2) far more broadly. Specifically, it was customary for the government to include language in the DPA stating that (1) the agreement must be “approved” by a federal district court and (2) the reviewing court was entitled, pursuant to 18 U.S.C. Section 3161(h)(2), to decline approval “for any reason.” For example:

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<sup>147</sup> *Id.*

<sup>148</sup> 18 U.S.C. § 3161(c)(1) (2008).

<sup>149</sup> *Id.* § 3161(h)(2) (emphasis added).

<sup>150</sup> *Fokker II*, 818 F.3d 773, 744 (D.C. Cir. 2016).

<sup>151</sup> *Id.* at 747.

- In *U.S. v. Robert S. Furst*, the DPA states that “the Agreement to defer prosecution of defendant Furst *must be approved by the Court*, in accordance with 18 U.S.C. § 3161(h)(2). *Should the Court decline to approve a deferred prosecution for any reason*, . . . this Agreement shall be null and void.”<sup>152</sup>
- In *U.S. v. BankAtlantic*, the DPA states that “the Agreement to defer prosecution of BankAtlantic *must be approved by the Court*, in accordance with 18 U.S.C. § 3161(h)(2). *Should the Court decline to approve a deferred prosecution for any reason*, . . . this Agreement shall be null and void.”<sup>153</sup>
- In *U.S. v. BP America Inc.*, the DPA states that “the Agreement to defer prosecution of BP America *must be approved by the Court*, in accordance with 18 U.S.C. § 3161(h)(2). *Should the Court decline to approve the Agreement to defer prosecution for any reason*, both BP America and the Department [of Justice] are released from all obligations imposed upon them by this Agreement . . . .”<sup>154</sup>

Throughout the decade preceding *Fokker I*, these exact same phrases—i.e., “must be approved by the Court” and “[s]hould the Court decline to approve a deferred prosecution for any reason”—were used in DPAs for numerous other cases, including *U.S. v. Lloyds TSB Bank PLC*,<sup>155</sup> *U.S. v. Honey Holding I, LTD.*,<sup>156</sup> *U.S. v. Groeb Farms, Inc.*,<sup>157</sup> *Re: Science Applications Int’l. Corp.*,<sup>158</sup> *Re: KPMG*,<sup>159</sup> *Re: JP Morgan Chase Bank, N.A.*,<sup>160</sup> *U.S. v. UBS AG*,<sup>161</sup> and *U.S. v. Love Irrigation*,

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<sup>152</sup> Deferred Prosecution Agreement at ¶ 13, *United States v. Furst*, No. H-03-363 (S.D. Tex. May 14, 2010) (emphasis added).

<sup>153</sup> Deferred Prosecution Agreement at ¶ 9, *United States v. BankAtlantic*, No. 06-60126 (S.D. Fla. April 27, 2006) (emphasis added).

<sup>154</sup> Deferred Prosecution Agreement at ¶ 26, *United States v. BP America Inc.*, No. 07 CR 683 (N.D. Ill. Oct. 25, 2007) (emphasis added).

<sup>155</sup> Deferred Prosecution Agreement at ¶ 4, *United States v. Lloyds TSB Bank PLC*, No. CR-09-007 (D.D.C. Jan. 9, 2009).

<sup>156</sup> Deferred Prosecution Agreement at ¶ 10, *United States v. Honey Holding I, LTD.*, No. 13 CR 138 (N.D. Ill. 2013).

<sup>157</sup> Deferred Prosecution Agreement at ¶ 10, *United States v. Groeb Farms, Inc.*, No. 13 CR 137 (N.D. Ill. Feb. 20, 2013).

<sup>158</sup> Deferred Prosecution Agreement at ¶ 8, *Re: Science Applications Int’l Corp.*, No. 11-CR-121 (S.D.N.Y. Mar. 8, 2012).

<sup>159</sup> Deferred Prosecution Agreement at ¶ 11, *Re: KPMG*, No. 05-CR-903 (S.D.N.Y. Aug. 29, 2005).

<sup>160</sup> Deferred Prosecution Agreement at ¶ 13, *Re: JPMorgan Chase Bank, N.A.*, No. 14-CR- (S.D.N.Y. Jan. 6, 2014).

<sup>161</sup> Deferred Prosecution Agreement at ¶ 15, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla. Feb. 18, 2009).

*Inc.*<sup>162</sup> In *U.S. v. America Online, Inc.*, the DPA states simply, “[s]hould the Court decline to approve the Agreement to defer prosecution for any reason, this Agreement shall be null and void.”<sup>163</sup>

It appears, then, that the government interpreted, over many years, the language in Section 3161(h)(2) to mean it was mandatory for federal district courts to subject DPAs to an approval process, and that such approval could be declined by the court for *any* reason. The U.S. Supreme Court has made it clear that similar histories of interpretation are entitled to significant deference. Indeed, the Court has “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>164</sup> The Court also stated in *Edwards’ Lessee v. Darby*<sup>165</sup> (an 1827 case that was later cited in the seminal case of *Chevron v. Natural Resources Defense Council*<sup>166</sup>) that “[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”<sup>167</sup> Moreover, the government’s interpretation was relied upon by the public, and by practicing attorneys,<sup>168</sup> for at least a decade leading up to *Fokker I*. In fact, in a January 2014 DPA put forth by the U.S. Attorney for the Southern District of New York—just five months before the government filed charges in *Fokker I*—the government was still using the “[s]hould the Court decline to approve the Agreement to defer prosecution for *any* reason” language.<sup>169</sup> However, in appealing the court’s *Fokker I* ruling, the government appears to change course, arguing to the appellate court that although the Speedy Trial Act fails to define the standard for time exclusion, the Act nevertheless “appears to ‘instruct courts to consider whether a deferred prosecution

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<sup>162</sup> Deferred Prosecution Agreement at ¶ 10, *United States v. Love Irrigation, Inc.*, No. 3:11cr91HTW-LRA (S.D. Miss. May 22, 2012).

<sup>163</sup> Deferred Prosecution Agreement at ¶ 4, *United States v. America Online, Inc.*, No. 1:04 M 1133 (E.D. Va. 2005) (emphasis added).

<sup>164</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 & n.14 (1984).

<sup>165</sup> 25 U.S. 206 (1827).

<sup>166</sup> *See Chevron*, 467 U.S. at 844 n.14.

<sup>167</sup> *Darby*, 25 U.S. at 210.

<sup>168</sup> *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 324 (2012) (discussing the Prior-Construction Canon, the authors state: “Perhaps the best explanation for the [canon] is this: The word or phrase at issue is a statutory term used in a particular field of law (to which the statute at issue belongs). When that term has been authoritatively interpreted by a high court, or has been given uniform interpretation by the lower courts or the responsible agency, the members of the bar practicing in that field reasonably enough assume that, in statutes pertaining to that field, the term bears this same meaning.”).

<sup>169</sup> Deferred Prosecution Agreement at ¶ 13, *Re: JPMorgan Chase Bank, N.A.*, No. 14-CR-\_\_\_ (S.D.N.Y. Jan. 6, 2014) (emphasis added).

agreement is truly about diversion and not simply a vehicle for fending off a looming trial date.”<sup>170</sup>

This *new* interpretation is obviously far more restrictive than the previous interpretation of allowing courts to decline DPA approval for “any reason.” U.S. Supreme Court precedent suggests that the government’s new interpretation of Section 3161(h)(2) is entitled to far less deference than its previous, consistently held interpretation. Specifically, in *INS v. Cardoza-Fonseca*,<sup>171</sup> the Court said that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”<sup>172</sup> In addition, the well-established canon of statutory interpretation guided by the *Skidmore* doctrine bolsters the view that, although language in Section 3161(h)(2) was ambiguous, courts should nevertheless uphold the interpretation that had been consistently put forth by the government.<sup>173</sup> According to Professor Dan Kahan,

Courts routinely give *Skidmore* deference to Justice Department readings. The most prominent examples come from antitrust law, in which the Department’s interpretations, although not imbued with formal legal effect, are nonetheless routinely engrafted by courts into controlling rules of law. Courts also accord substantial weight to the Justice Department’s reading of the Civil Rights Act of 1964 and the Voting Rights Act. *It would be perfectly consistent with these lines of authority to apply Skidmore deference to the Justice Department’s readings of ambiguous criminal statutes.*<sup>174</sup>

Professor Kahan adds that it is the criminal law context “in which the relevant considerations—from expertise, to uniformity, to accountability, to rule of law values—all support giving conclusive weight to the Department’s considered views.”<sup>175</sup> For many years, the government’s “considered view” in interpreting Section 3161(h)(2) was that district courts could decline DPA approval for *any reason*. This longstanding interpretation was dramatically narrowed through the *Fokker II* ruling.

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<sup>170</sup> Government’s Supplemental Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V at 12, *Fokker I*, No. 14-CR-121 (R.JL), (D.D.C. July 18, 2014) (citing *HSBC I*, 12-CR-00763-JG, Document 23, at 6).

<sup>171</sup> 480 U.S. 421 (1987).

<sup>172</sup> *Id.* at 446 n.30 (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

<sup>173</sup> See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 508 (1996) (discussing how both the Chevron and Skidmore doctrines “support[] judicial acquiescence in executive branch interpretations. Indeed, courts often give substantial if not controlling weight to the readings of agencies. . . . that lack delegated lawmaking powers but that nonetheless possess important enforcement responsibilities.”).

<sup>174</sup> *Id.* at 509 (emphasis added) (citations omitted).

<sup>175</sup> *Id.*

An exchange that occurred during oral argument of *Fokker II*, in the D.C. Circuit Court of Appeals, helped shed more light on the government's sudden revised interpretation of Section 3161(h)(2). At one point, the Court states that the statute makes clear that when the government and a defendant jointly file a DPA with a district court, "[t]here's always some risk that the court is *not* going to approve of the deal."<sup>176</sup> Counsel responds, "[i]t's never happened before, Judge. It actually has never happened before. And that's part of the calculation that the company makes, and other companies make."<sup>177</sup> This exchange suggests that the government's initial interpretation of Section 3161(h)(2) (i.e., that a district court can reject a DPA "for any reason") was likely left in place for all those years simply because it did not seem to influence courts in either direction; in other words, the rubberstamping of agreements by district courts was so routine that, despite the ability to reject "for any reason," approval nevertheless appeared to be *guaranteed*. Indeed, it appears that reliance on district court approval of DPAs came to be "part of the calculation" when companies decided whether to resolve allegations of wrongdoing through deferred prosecution.<sup>178</sup> As the appellate court suggested during oral argument, however, the government should have known there *was* in fact a risk of rejection, however small that risk appeared to be based on the history of district courts routinely rubberstamping agreements. That is exactly what an Article III, independent judge is permitted to do: to rule "yes" or "no" on a request by the government.<sup>179</sup>

In addition, *Fokker II* puts forth the pivotal assertion that "[t]he statutory language ties the 'approval of the court' requirement to the DPA's 'purpose of allowing the defendant to demonstrate his good conduct.'"<sup>180</sup> Here again is the excerpt from the statute: "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the *purpose of allowing the defendant to demonstrate his good conduct*."<sup>181</sup>

Contrary to *Fokker II*'s assertion, there is a strong argument, founded in English grammar, that the phrase "with the approval of the court" actually modifies the noun or phrase that it immediately *follows*.<sup>182</sup> The phrase it immediately follows

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<sup>176</sup> Oral argument at 19:20, *Fokker II*, 818 F.3d 733, 744 (D.C. Cir. 2016), [https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/2963B2550D4F056F85257E BD00525404/\\$file/15-3016.mp3](https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/2963B2550D4F056F85257E BD00525404/$file/15-3016.mp3) [<https://perma.cc/S8J4-5EPB>].

<sup>177</sup> *Id.* at 19:25.

<sup>178</sup> *Id.*

<sup>179</sup> See Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L. J. 221, 221–26 (2003).

<sup>180</sup> *Fokker II*, 818 F.3d 733, 744 (D.C. Cir. 2016) (quoting 18 U.S.C. § 3161(h)(2) (2008)).

<sup>181</sup> 18 U.S.C. § 3161(h)(2) (2008) (emphasis added).

<sup>182</sup> See Richard Nordquist, *Glossary of Grammatical and Rhetorical Terms*, THOUGHTCO. (Oct. 24, 2016), <http://grammar.about.com/od/rs/g/referentterm.htm> [<https://perma.cc/4SB2-JMYQ>]. ("In English grammar, a *referent* is the person, thing, or idea that a word or expression denotes, stands for, or refers to. For example, the referent of the



is: “[a]ny period of delay during which prosecution is deferred . . . pursuant to written agreement with the defendant.”<sup>183</sup> This means the statutory language is mandating court approval of the *deferral and the written agreement effectuating that deferral*. The U.S. Supreme Court comes to the same conclusion in *Barnhart v. Thomas*,<sup>184</sup> explaining the grammatical rule that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”<sup>185</sup> Under this interpretation, the district court would have the authority to consider a DPA’s agreement terms in making its approval decision, rather than having to “confine[] its inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct.”<sup>186</sup>

This interpretation is bolstered by the fact that, under the interpretation put forth by *Fokker II*, the phrase “with the approval of the court” is rendered superfluous. Consider the language of Section 3161(h)(2) with the words “*with the approval of the court*” being omitted. The provision would then read: “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant for the purpose of allowing the defendant to demonstrate his good conduct.”

Even with the language removed, a district court’s task in deciding if an exception under Section 3161(h)(2) applies would nevertheless be the same: to assess whether the DPA was serving “the purpose of allowing the defendant to demonstrate his good conduct.” Thus, under *Fokker II*’s interpretation, the words “*with the approval of the court*” are unnecessary and have no consequence. The statute would have the same meaning and effect without them—an interpretation that violates the Surplusage Canon.<sup>187</sup> As Thomas M. Cooley states: “the courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.”<sup>188</sup>

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word *door* is the object ‘door.’ Referring words are words, such as pronouns, that point back to other items in a text (anaphoric reference) or (less commonly) point ahead to a later part of the text (cataphoric reference).” (emphasis added)).

<sup>183</sup> 18 U.S.C. § 3161(h)(2) (2008).

<sup>184</sup> 540 U.S. 20 (2003).

<sup>185</sup> *Id.* at 26 (citing NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (6th ed. 2000) (“Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.”)). See also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (2012) (discussing the Grammar Canon, which states: “Words are to be given the meaning that proper grammar and usage would assign them.”).

<sup>186</sup> *Fokker II*, 818 F.3d 733, 747 (D.C. Cir. 2016).

<sup>187</sup> SCALIA & GARNER, *supra* note 168, at 174 (quoting the Surplusage Canon which reads “If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

<sup>188</sup> THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS: WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 58 (1972). See also *United States v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”).

Moreover, legislative history points out that Assistant Attorney General W. Vincent Rakestraw, in testimony before the House Judiciary Committee, proposed deleting the phrase “*with the approval of the court*” from the legislation because “[i]nvolving the court in this type of prosecutorial decision would seemingly violate the doctrine of separation of powers.”<sup>189</sup> Yet the Committee did not act on Rakestraw’s proposal, lending still more credence to the notion that Congress felt those words were necessary and not superfluous to the successful operation of the statute.<sup>190</sup>

To support a more expansive reading of a district court’s approval authority under Section 3161(h)(2), amicus curiae in *Fokker II* analogized a court’s review of a DPA under Section 3161(h)(2) to a court’s review of a proposed plea agreement under Rule 11 of the Federal Rules of Criminal Procedure.<sup>191</sup> Although the argument failed to persuade the appellate court, on balance one could easily have sided with amicus on the matter. *Fokker II* states that the context of a DPA is “markedly different” from that of a plea agreement, and goes on to say it is “more like a dismissal under Rule 48(a).”<sup>192</sup> Specifically, the appellate court states that although plea agreements involve convictions and sentences, DPAs do not—indeed, “the entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law.”<sup>193</sup> According to the appellate court, a district court, in approving a DPA, “merely approves the prosecution’s judgment that further pursuit of criminal charges is unwarranted, as it does when it approves a prosecutor’s motion to dismiss charges under Rule 48(a).”<sup>194</sup>

This reasoning falls short of the mark in several respects. First, contrary to the assertion in *Fokker II*, the “entire object” of a DPA is far more comprehensive than enabling a defendant to avoid criminal conviction and sentence by demonstrating good conduct and compliance with the law. The object of a DPA is manifold, as former Assistant Attorney General Lanny Breuer explains:

in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government . . . it almost always must acknowledge wrongdoing, agree to cooperate with the government’s investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability.<sup>195</sup>

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<sup>189</sup> PARTRIDGE, *supra* note 30, at 117–18.

<sup>190</sup> *See id.*

<sup>191</sup> *Fokker II*, 818 F.3d at 745.

<sup>192</sup> *Id.* at 746.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Breuer, *supra* note 9.

Professor Brandon Garrett tells us DPAs and similar agreements can be used by the government to bring about “structural reform”—including “sweeping internal reforms”—within corporate entities.<sup>196</sup> In addition, by agreeing to a DPA, defendants thereby waive their rights under the Speedy Trial Act—waivers that district courts must ensure are engaged in both knowingly and voluntarily.<sup>197</sup>

Thus, in approving a DPA, a district court does far more than “merely approve[] the prosecution’s judgment that further pursuit of criminal charges is unwarranted,”<sup>198</sup> as *Fokker II* asserts. Although the end result of using a DPA is *usually* the dismissal of charges,<sup>199</sup> it does not mean that a district court’s approval of a DPA can or should be likened to a court’s approval of a motion to dismiss charges under Rule 48(a).<sup>200</sup> Specifically, as *Fokker II* points out, there is a long and settled history of the extreme deference that courts give to prosecutors dismissing charges under Rule 48(a).<sup>201</sup> However, it is a leap for the appellate court to then suggest that the operation of a DPA is less like a plea agreement and more like a dismissal under Rule 48(a).<sup>202</sup> The implication, of course, is that both of these mechanisms for dismissing charges—the DPA and Rule 48(a)—might be similar with respect to the amount of deference that is owed by a district court to the government when the government employs either of them. But given that DPAs are created with the explicit goal of accomplishing far more than merely dismissing the case, surely those agreements are owed a greater depth and degree of judicial review than are motions to dismiss under Rule 48(a)—a simple and straightforward motion that involves no waiver of speedy trial rights, no acknowledgment of wrongdoing, no imposition of a fine, no agreement to beef up compliance programs or cooperate with government investigations, and no possibility that originally-filed charges might end up being prosecuted by the government if it declares a breach has occurred—all provisions that burden the defendant and that form the core of most

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<sup>196</sup> Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007).

<sup>197</sup> PARTRIDGE, *supra* note 30, at 116 (reporting that former Assistant U.S. Attorney Daniel A. Reznick testified in Senate Hearings for the Speedy Trial Act that since deferred prosecutions have “some of the elements of a plea bargain and . . . result in a pro tanto waiver of the defendant’s right to a speedy trial, approval by the court on the record is a wise and necessary safeguard.”).

<sup>198</sup> *Fokker II*, 818 F.3d at 746.

<sup>199</sup> Dismissal of charges is contingent, of course, on whether the government determines that the defendant has satisfactorily met all the requirements of the DPA agreement. See Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 631, 644–45 (2014) (stating that “[t]hese agreements often include provisions in which the government is listed as the sole decider as to whether a breach has occurred. As a result, the question of whether a company actually breached the agreement is not subject to an objective trier-of-fact’s judgment, but posed to the government, which might have an ancillary interest in protecting the status of ‘successful’ deferred prosecution agreements.”).

<sup>200</sup> *Fokker II*, 818 F.3d at 746.

<sup>201</sup> *Id.* at 741 (citing *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)).

<sup>202</sup> *Contra id.* at 746–47.

DPA agreements.<sup>203</sup> Instead, a Rule 48(a) action leads to an immediate dismissal and nothing more.

In addition, the form and function of DPAs have strong similarities to plea agreements: (1) both are ADR vehicles that address matters without going to trial; (2) both involve the government and defendant negotiating a final agreement in order to resolve the issue; and (3) defendants using either ADR vehicle could potentially fall victim to the so-called “innocence problem”<sup>204</sup> (occurring when defendants decide to agree to a DPA or plea deal even though they never engaged in the alleged wrongdoing).<sup>205</sup> In a plea agreement, defendants agree to accept guilt (unless it’s an *Alford* plea)<sup>206</sup> and conviction without a trial in order to receive a lesser charge or sentence from the government.<sup>207</sup> Similarly, in a DPA, defendants agree to accept a host of provisions negotiated with the government in order to receive a dismissal of all charges upon successful completion of those provisions. Finally, former Assistant U.S. Attorney Daniel A. Rezneck testified in Senate Hearings for the Speedy Trial Act that deferred prosecution has clear similarities to a plea deal.<sup>208</sup>

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<sup>203</sup> See Xian, *supra* note 199, at 644–45; see also First, *supra* note 41, at 47.

<sup>204</sup> The innocence problem “is the recognition that when a prosecutor offers a defendant the opportunity to plead guilty in exchange for a more lenient punishment, the offer may lead an innocent defendant to plead guilty.” Adam N. Stern, Note, *Plea Bargaining, Innocence, and the Prosecutor’s Duty to “Do Justice,”* 25 GEO. J. LEGAL ETHICS 1027, 1027 (2012) (citation omitted). See also Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L. Q. 561, 601–03 (2014) (discussing that “there are serious consequences in terms of trial penalties for defendants who do not accept plea deals. This may make it more likely that innocent defendants will feel the pressure and decide to plead guilty.”).

<sup>205</sup> Reilly, *supra* note 14, at 350.

<sup>206</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003) (explaining that in *Alford* pleas, “defendants plead guilty while simultaneously protesting their innocence”).

<sup>207</sup> Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3607 (2013) (“There are two broad categories of plea negotiations, each of which generally entails concessions on the part of both the prosecution and the defendant: charge bargaining and sentence bargaining. In charge bargaining, the defendant agrees to plead guilty in exchange for the dropping of some charges or the decrease in their severity. In sentence bargaining, the prosecution agrees to recommend a lesser sentence in return for the guilty plea. These categories are not mutually exclusive, and many plea agreements will contain elements of both.”) (citations omitted); see also Greenblum, *supra* note 33, at 1869 (“A guilty plea [in plea bargaining] results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial.”) (citation omitted).

<sup>208</sup> PARTRIDGE, *supra* note 30, at 116 (testifying that deferred prosecutions have “some of the elements of a plea bargain.”).

Moreover, although *Fokker II* is correct to say that DPAs do not technically involve convictions and sentences,<sup>209</sup> DPA provisions effectively translate into the same thing. As one group of commentators puts it:

[A] DPA amounts in sum and substance to a guilty plea *and* a conviction; the corporate defendant must admit facts sufficient to support a finding of guilt, pay substantial fines and/or forfeiture, and typically subject itself to government oversight for the length of the deferral period—in essence a probationary period.<sup>210</sup>

One scholar, in an article entitled “Kinds of Punishment,” writes that “[s]ome of the most innovative and creative ‘punishments’ are imposed on corporations pursuant to deferred prosecution agreements.”<sup>211</sup> To further support the view that DPAs include penalties or fines that in effect amount to a “sentence,” it is interesting to note that in many DPA agreements, the government uses the U.S. Sentencing Guidelines to determine the applicable fine range.<sup>212</sup> The Sentencing Guidelines were used, for example, to help calculate fines in the following agreements: *U.S. v. Och-Ziff Capital Management Group LLC*,<sup>213</sup> *U.S. v. Latam Airlines Group S.A.*,<sup>214</sup> *U.S. v. Embraer S.A.*,<sup>215</sup> *U.S. v. Olympus Latin America, Inc.*,<sup>216</sup> and *Re: Smith & Nephew, Inc.*<sup>217</sup>

Perhaps the greatest similarity between plea agreements and DPAs is that, in both ADR processes, the government holds the majority of *power* during the entire process. In plea agreements, prosecutors serve “not only as prosecutor but [also] as

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<sup>209</sup> *Fokker II*, 818 F.3d 733, 746 (D.C. Cir. 2016).

<sup>210</sup> Rush et al., *supra* note 5, at 2.

<sup>211</sup> Douglas Husak, *Kinds of Punishment* (Apr. 1, 2017), available at <https://ssrn.com/abstract=2979458> [<https://perma.cc/V8KN-Z5G9>].

<sup>212</sup> U.S. SENTENCING GUIDELINES MANUAL 28 U.S.C. §§ 991–98 (U.S. SENTENCING COMM’N 2008) The U.S. Sentencing Guidelines Manual is written and updated by the U.S. Sentencing Commission, which is charged with promulgating guidelines for federal sentencing.

<sup>213</sup> Deferred Prosecution Agreement at ¶ 7, United States v. Och-Ziff Capital Management Group LLC, No. 16-516 (NGG) (E.D.N.Y. 2016).

<sup>214</sup> Deferred Prosecution Agreement at ¶ 7, United States v. Latam Airlines Group S.A., No. 16-60195-CR-HURLEY (S.D. Fla. 2016).

<sup>215</sup> Deferred Prosecution Agreement at ¶ 7, United States v. Embraer S.A., No. 16-60294-CR-COHN (S.D. Fla. 2016).

<sup>216</sup> Deferred Prosecution Agreement at ¶ 7, United States v. Olympus Latin America, Inc., No. 16-3525 (MF) (D.N.J. 2016).

<sup>217</sup> Deferred Prosecution Agreement at ¶ 5, Re: Smith & Nephew, Inc., No. 1:12-cr-00030-RBW (D.D.C. 2012).

quasi-judge and jury.”<sup>218</sup> And the same can be said with respect to DPAs, where prosecutors are given “unmitigated power to be judge, jury and sentencer.”<sup>219</sup>

The U.S. Sentencing Guidelines state in connection with plea deals that “when the dismissal of charges . . . is contingent on acceptance of a plea agreement, the court’s authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether dismissal of charges will undermine the sentencing guidelines.”<sup>220</sup> Given that DPAs are so similar in form and function to plea agreements, this same reasoning should apply in the DPA context: because the dismissal of charges is contingent on the defendant’s acceptance of a DPA, (1) the court’s authority to adjudicate guilt and impose sentence is implicated, and (2) the court should be permitted to determine whether or not the fine or dismissal of charges would undermine the sentencing guidelines. This idea comports well with the judiciary’s “traditional power over criminal *sentencing*.”<sup>221</sup> Moreover, a similar idea, using similar reasoning, was put forth in a law review article published in 1974, when pretrial diversion programs were first being introduced.<sup>222</sup> This will be discussed further in Part VI, below.

### C. Charging Discretion

Perhaps the most misdirected proposition put forth by *Fokker II* is the idea that DPA agreement provisions are the functional equivalent of prosecutorial charging decisions, and that federal district courts therefore lack the competence to review them.<sup>223</sup>

There are few areas of law that are more firmly settled than a prosecutor’s wide discretion and total independence with respect to charging decisions<sup>224</sup>—meaning the prosecutor has complete and unfettered discretion in deciding *whether* to initiate

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<sup>218</sup> Stern, *supra* note 204, at 1035. See also Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIG., GENDER & CLASS 191, 194 (2015) (“Plea bargaining, is a form of negotiation with structural power imbalances.”).

<sup>219</sup> *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines? Hearing Before the H. Comm. on the Jud. Subcomm. on Commercial and Admin. Law*, 8th Cong. 5 (N.J. 2008) [hereinafter *Hearing*] (Statement of Rep. Bill Pascrell, Jr.).

<sup>220</sup> U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (U.S. SENTENCING COMM’N 2002).

<sup>221</sup> *Fokker II*, 818 F.3d 733, 745 (D.C. Cir. 2016).

<sup>222</sup> Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L. J. 827 (1974).

<sup>223</sup> The appellate court states the following: “And the Judiciary’s lack of competence to review the prosecution’s initiation and dismissal of charges equally applies to review of the prosecution’s decision to pursue a DPA and the choices reflected in the agreement’s terms. As with conventional charging decisions, a DPA’s provisions manifest the Executive’s consideration of factors such as the strength of the government’s evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight.” *Fokker II*, 818 F.3d at 744 (citation omitted).

<sup>224</sup> See *id.* at 741 (“The Executive’s primacy in criminal charging decisions is long settled. That authority stems from the Constitution’s delegation of ‘take Care’ duties, U.S. Const. art. II, § 3, and the pardon power, *id.* § 2, to the Executive Branch.”).

charges<sup>225</sup> or dismiss them once brought,<sup>226</sup> *what* charges to file or take before a grand jury,<sup>227</sup> *when* to file charges,<sup>228</sup> and *whom* to charge.<sup>229</sup> However, that settled area of law has evolved over a period of time when nearly all criminal cases were settled through trial or plea agreement—both of which have powerful checks in place to balance the prosecutor’s charging power. For example, within a trial, the *jury* acts as a first check: if the prosecutor is unfair in charging, that can influence whether a jury decides to convict, not convict, or perhaps employ jury nullification if it believes the law is immoral or wrongly applied.<sup>230</sup>

Given that criminal trials are conducted in public,<sup>231</sup> the second check is provided by the public itself. Consider what the U.S. Supreme Court tells us about the ability of public trials to restrain judicial and prosecutorial power:

Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.<sup>232</sup>

Then, during sentencing, the judge provides yet another check on the government’s charging power. The judge might decide, after reflecting upon the U.S. Sentencing Guidelines as well as sentencing factors under 18 U.S.C. § 3553(a),<sup>233</sup> to issue a sentence that more closely reflects a different charge. In plea agreements, the judge sits as the only check on the government’s charging power, but it is a powerful check nonetheless.<sup>234</sup> For example, “[i]f a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should . . . give the agreement due consideration,

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<sup>225</sup> *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

<sup>226</sup> *Id.*

<sup>227</sup> *United States v. Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>228</sup> *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

<sup>229</sup> *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982); *accord* *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

<sup>230</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *see also* Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, 43 A.B.A. LITIG. 25, 28 (2017) (“[J]ury nullification has historical origins, such as checking the prosecution and the legislature in response to the enactment and enforcement of certain laws.”).

<sup>231</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . .”).

<sup>232</sup> *In re Oliver*, 333 U.S. 257, 270 (1948).

<sup>233</sup> FED. R. CRIM. P. 11(b)(1)(M).

<sup>234</sup> *See* *Missouri v. Frye*, 566 U.S. 134, 148–49 (2012) (“[A] defendant has no right to be offered a plea, nor a federal right that the judge accept it.”) (citations omitted).

but *notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions.*"<sup>235</sup>

However, in the context of a DPA, the prosecutor gets to control *all* those checks and balances that in trials or plea agreements would be controlled by judges, juries, and the watching public. Thus, by framing the agreement provisions of DPAs as functionally equivalent to prosecutorial charging decisions, *Fokker II* appears to be setting the law on a course that would prevent district courts from reviewing DPA agreement terms. While a judge should not play a role in *crafting* the terms of a DPA agreement, of course—just as a judge cannot play a role in crafting the terms of a plea agreement<sup>236</sup>—there are no separation of power issues with courts reviewing the DPA in its final form, and then deciding whether to accept or reject that agreement. Although the Speedy Trial Act does not provide any guidance or standards for courts in making the decision to accept or reject a DPA, the same is true for courts when they decide to accept or reject plea agreements under Rule 11 of the Federal Rules of Criminal Procedure.<sup>237</sup>

Moreover, in *Fokker I*, as in all other federal cases involving DPAs, the government *did* have complete and unfettered discretion in charging: the government independently determined the charges in the case, and then filed those charges. The DPA was filed as an entirely separate document.<sup>238</sup> Specifically, the government filed a one-count information against Fokker, charging the company with conspiracy to violate the International Emergency Economic Powers Act.<sup>239</sup> Concurrently, the government filed a DPA with the court. Even though these two documents are sometimes filed together, creating and filing a DPA is part of a separate and alternative process from the traditional litigation process set into motion with filing charges. The Washington Supreme Court sets forth the idea succinctly: "once the accused has been charged and is before the court, *the charging function ceases.*"<sup>240</sup> Similarly, in *Fokker I*, once the government filed a one-count information against the Fokker company, the charging function ceased.

Although *Fokker II* likens DPA agreement provisions to "conventional charging decisions,"<sup>241</sup> communications between the government and the defendant in deciding to pursue a DPA, and in crafting the provisions that will make up the agreement itself, all take place *outside* the parameters of the court and outside the protection of the rules and procedures that have been written over the last decades

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<sup>235</sup> AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 127 (3d ed. 1999) (emphasis added), [https://www.americanbar.org/content/dam/aba/publication\\_s/criminal\\_justice\\_standards/pleas\\_guilty.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publication_s/criminal_justice_standards/pleas_guilty.authcheckdam.pdf) [https://perma.cc/FHB7-2R5B].

<sup>236</sup> FED R. CRIM. P. 11(c)(1).

<sup>237</sup> FED R. CRIM. P. 11(c)(3).

<sup>238</sup> *Fokker I*, 79 F. Supp. 3d 160, 163 (D.D.C. 2015).

<sup>239</sup> *Id.* at 161.

<sup>240</sup> Washington *ex rel.* Schillberg v. Cascade Dist. Court, 621 P.2d 115, 119 (Wash. 1980) (emphasis added).

<sup>241</sup> *Fokker II*, 818 F.3d 733, 744 (D.C. Cir. 2016).



to ensure a just and fair process within the traditional litigation context.<sup>242</sup> The two processes—traditional litigation versus deferred prosecution—might be seen as two separate trains placed along parallel, but separate, tracks. One train (the DPA that has been filed) is awaiting acceptance or rejection by the district court. The second train (the *charge* in the form of the one-count information that has been filed) is waiting for the court’s ruling in the DPA matter before it will be addressed, i.e., before the government decides whether to move forward with prosecution of the charge.

If the district court *approves* the DPA, the terms of the agreement can be met during the deferral period, and the government can then move to dismiss the charge from the one-count information. Or, the defendant might fail to successfully carry out the terms of the DPA and the government will then have to decide whether to prosecute its originally-filed charge. If the district court *rejects* the DPA, on the other hand, the government still has numerous other options it can pursue: (1) it can walk away and do nothing (in which case the matter will surely be dismissed in due time due to the Speedy Trial Act); (2) it can make a Rule 48(a) motion to dismiss any or all charges;<sup>243</sup> (3) it can negotiate a new DPA and submit it to the court for possible approval; (4) it can sign a Non-Prosecution Agreement (“NPA”) with the defendant without requiring any judicial approval whatsoever;<sup>244</sup> (5) it can file any new, additional, or different charges that it deems appropriate; or (6) it can move forward with prosecuting the charges initially filed in the matter. Thus, giving a district court the power to accept or reject a DPA based on a review of its agreement terms in no way interferes with government discretion regarding charging decisions; in no way does it interfere with government choices “about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought.”<sup>245</sup>

*Fokker II* correctly states,<sup>246</sup> and it is well settled, that the Judiciary lacks competence to review the prosecution’s initiation and dismissal of charges.<sup>247</sup> However, the appellate court then concludes that this lack of competence “equally applies to review of [1] the prosecution’s decision to pursue a DPA and [2] the choices reflected in the agreement’s terms.”<sup>248</sup> As for the first of those two—the prosecution’s decision to pursue a DPA—a federal court certainly cannot review or interfere with a prosecutor’s discretion to *file* a DPA for approval, which is arguably the equivalent of “pursue a DPA.” This is a straightforward separation-of-power

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<sup>242</sup> See Greenblum, *supra* note 33, at 1864 (“Deferral is a powerful prosecutorial tool because it is negotiated and implemented exclusively by the prosecutor.”).

<sup>243</sup> FED. R. CRIM. P. 48(a).

<sup>244</sup> Sullivan & Cromwell LLP, *Judicial Review of Deferred Prosecution Agreements*, Feb. 6, 2015, at 3 (“NPAs, unlike DPAs, do not typically involve filings that require court approval.”).

<sup>245</sup> *Fokker II*, 818 F.3d at 737.

<sup>246</sup> *Id.* at 741, 744.

<sup>247</sup> *Wayte v. United States*, 470 U.S. 598, 607–08 (1985).

<sup>248</sup> *Fokker II*, 818 F.3d at 744.

scenario: the government files the DPA and the motion for exclusion of time under the Speedy Trial Act, and then awaits the court's ruling on the motion.<sup>249</sup>

However, the second contention by the appellate court—that the Judiciary lacks competence to review the agreement term choices—is simply incorrect for two reasons. First because, as was just discussed at length, DPA agreement provisions are *not* the functional equivalent of charging decisions. Second because although it takes time for a district court to become familiar with the details of a case in order to assess the terms of the DPA, district court judges—including those handling the *Fokker I*, *Saena Tech Corp.*, and *HSBC* matters—have proven through past rulings that they are willing to be more than “potted plants” and “rubber stamps”<sup>250</sup> in the DPA process, and in fact are willing to spend the time and energy required to thoroughly understand the issues involved in even very complex cases.<sup>251</sup> Moreover, not only has Congress specifically directed district courts to play a role in the DPA approval process,<sup>252</sup> but district courts have a long history of competently reviewing plea agreements<sup>253</sup> and consent orders,<sup>254</sup> and a review process for DPA agreement terms would present similar challenges that can also be competently, and successfully, met.<sup>255</sup>

*Fokker II* concludes that the district court denied the exclusion of time (and thereby rejected the DPA) based partly on concerns that the government should have made different charging decisions.<sup>256</sup> As the court puts it: “[w]e hold that the [Speedy Trial] Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different

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<sup>249</sup> The DPA approval process entails filing the DPA agreement along with a motion for exclusion of time pursuant to Section 3161(h)(2) of the Speedy Trial Act, thereby enabling the government to exceed the Act's normal seventy-day time limit associated with prosecuting a case. *See supra* Part III.

<sup>250</sup> The *HSBC* district court noted it was not willing to act as a mere “potted plant” in the DPA approval process, *HSBC I*, No. 12-CR-763, 2013 WL 3306161, at \*5 (E.D.N.Y. July 1, 2013), and the *Fokker* district court noted it was not a mere “rubber stamp” in the process, *Fokker I*, 79 F. Supp. 3d 160, 164 (D.D.C. 2015).

<sup>251</sup> DPA provisions are wide-ranging in terms of the substantive areas they cover—including issues surrounding implementing monitors, fines, and enhanced anticorruption control systems and compliance measures within the company's finance office and elsewhere throughout the company. First, *supra* note 41, at 47.

<sup>252</sup> 18 U.S.C. § 3161(h)(2) (2008).

<sup>253</sup> *Fokker II*, 818 F.3d 733, 745–46 (D.C. Cir. 2016).

<sup>254</sup> *See discussion infra* Section V.D.

<sup>255</sup> Of course, there might be reasons why procedures should be put into place to enable the government to have in camera conversations with the district court judge, enabling the judge to better understand the reasoning behind some of the government's proposed deal provisions. If the judge ultimately rejects the DPA and the government decides to proceed to trial, however, it might then be appropriate for a *new* judge to be assigned to the matter—one not privy to the sensitive information discussed earlier in camera, such as the strength of the government's case, etc.

<sup>256</sup> *Fokker II*, 818 F.3d at 738–40.

charges or should charge different defendants.”<sup>257</sup> However, although the district court expressed great surprise that no *individuals* were being prosecuted in the matter,<sup>258</sup> it could be argued that the decision to reject was nevertheless based on the court’s concerns of leniency toward the company with respect to the fine, probationary period, and monitoring plan.<sup>259</sup> In fact, in cataloguing near the end of the opinion the “minimum” that “one would expect” to see in the DPA, the court says nothing about charging decisions.<sup>260</sup> Rather, the court stated:

Surely one would expect, at a minimum, a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance.<sup>261</sup>

Of course, to the extent any district court tells the government to file new or different charges in a given case, or suggests that DPA approval is contingent upon the government doing so, such behavior would cross the line of appropriate judicial conduct and would amount to “assum[ing] the role of Attorney General.”<sup>262</sup> But that is not what occurred in this case. In fact, the court in *Fokker I* appeared to be emphasizing that it was *not* crossing the line into inappropriate behavior when it stated: “[t]o be clear . . . I am not ordering or advising the Government, or the defendant, to undertake or refrain from undertaking any particular action—I am merely declining to approve the document before me.”<sup>263</sup>

It could be argued that a certain amount of damage was done, and could not be remedied, when the *Fokker I* court listed the “minimum” fine, probationary period, and monitoring situation that “one would expect” to be included in the DPA agreement.<sup>264</sup> After all, such comments could be interpreted as the court suggesting what *must* be included in a future version of the same DPA to gain court approval, thereby stoking separation of power concerns that prohibit district courts from assisting the government in crafting DPAs.<sup>265</sup> With that in mind, in the future, if a

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<sup>257</sup> *Id.* at 738.

<sup>258</sup> *Fokker I*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015).

<sup>259</sup> *Id.* at 167.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Fokker II*, 818 F.3d at 743 (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

<sup>263</sup> *Fokker I*, 79 F. Supp. 3d at 167.

<sup>264</sup> *Id.*

<sup>265</sup> See Mary Miller, Note, *More Than Just a Potted Plant: A Court’s Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 166 (2016) (“Some might argue that to serve justice, courts should be able to review specific terms within the agreements and suggest changes and alterations to make the terms acceptable, rather than being constrained to accept or reject the agreements in their entirety. Such review, however, may give rise to real separation-of-powers concerns.”).

district court decides to reject a DPA, it would be a better course of action for the court to refrain from making any suggestion whatsoever regarding what should or should not be included in the agreement, and instead to state only that (1) the court is declining to approve the agreement set before it, and (2) the court remains open to considering a modified version in the future should the parties decide to submit one.<sup>266</sup>

#### *D. Public Interest*

The legislative history of the Speedy Trial Act makes clear that *public interest* was at the forefront of concerns driving the passage of the legislation.<sup>267</sup> For example, the record indicates there would be a “requirement that continuances be granted only upon a showing of good cause, taking into account *not only the consent of the parties but also the public interest* in prompt disposition of the case.”<sup>268</sup> Judge William G. Young reminds us that, in the context of plea agreements, the judge’s role “is zealously to protect the public interest.”<sup>269</sup> The same is true for DPAs: the district court judge, being the only independent safeguard in place to protect the parties and the public, needs to be able to review the agreement’s terms and thereby determine whether the agreement should be accepted or rejected. Judge Young points out that considerations of the public interest are actually “heightened” in the criminal law context<sup>270</sup>—the context in which corporate DPAs commonly occur.

Moreover, again specifically in the context of plea agreements, Judge Young reminds us that when a judge accepts a plea agreement and then moves to sentence the defendant, the court thereby “places the imprimatur of legitimacy, as an independent branch of government, on the parties’ bargain.”<sup>271</sup> Indeed, district courts place their “imprimatur of legitimacy” on parties’ negotiated outcomes in numerous processes—including the three ADR processes of plea agreements, consent orders, and DPAs.<sup>272</sup> And although Judge Young sees a difference between “a judge’s decision to accept a guilty plea with an attendant sentencing

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<sup>266</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14 (2004) (“The judge must guard against the temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it.”).

<sup>267</sup> *Zedner v. United States*, 547 U.S. 489, 501 (2006) (noting the Speedy Trial Act “was designed with the public interest firmly in mind.”).

<sup>268</sup> PARTRIDGE, *supra* note 30, at 11–12 (emphasis added).

<sup>269</sup> *United States v. Orthofix, Inc.*, 956 F. Supp. 2d 316, 323 (D. Mass. 2013).

<sup>270</sup> *Id.* at 325.

<sup>271</sup> *Id.*

<sup>272</sup> See, e.g., *Fokker I*, 79 F. Supp. 3d 160, 165 (D.D.C. 2015) (“The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA.”); *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 29 (D.D.C. 2015) (“[T]he [Speedy Trial Act] requirement of court approval implies that the court must place its formal imprimatur on the [DPA] agreement.”); *HSBC I*, No. 12-CR-763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013) (“The parties have asked the Court to lend . . . a judicial imprimatur to the DPA . . .”).

recommendation” and “a judge’s decision to issue a consent order, *similar considerations of public interest obtain*.”<sup>273</sup> These same considerations of public interest apply to DPAs as well. Thus, district courts, if given reasonable powers to review agreements achieved through each of the three ADR processes, can play a crucial role in protecting the public interest. This is especially so when corporate entities are involved, given their unique strength and position to cause public harm.<sup>274</sup>

Moreover, what Professors Richard Bierschbach and Stephanos Bibas tell us about plea deals is in many respects applicable to all three ADR processes:

There is only one thing missing from this rosy mutuality of advantage: justice. Sentencing should not be about haggling over the market price of a sack of potatoes, but about doing justice. In a democracy, justice must heed public values and voices . . . . The interests and views at stake are not limited to those of two partisans who bring their deal to the sentencing judge as a *fait accompli*. Those partisans may *selectively present information and pursue private agendas that may diverge from those of the public at large*. As prosecutors are imperfect agents of the public interest, we cannot complacently trust plea bargaining to do justice.<sup>275</sup>

With respect to all three ADR processes, the government actors are “imperfect agents of the public interest” and cannot be trusted “to do justice” in crafting the agreements.<sup>276</sup> Even a former U.S. Deputy Attorney General suggested that federal prosecutors can potentially be “stupid, malevolent, or a cowboy or cowgirl who . . . [do] not want to be reasonable” when making prosecution related decisions.<sup>277</sup> This view adds credence to the notion that district courts should be given reasonable and adequate powers of judicial review over the DPAs that are, after all, being negotiated by some of those very same federal prosecutors. Such

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<sup>273</sup> *Orthofix*, 956 F. Supp. 2d at 327 (emphasis added).

<sup>274</sup> See Memorandum from Paul J. McNulty, Deputy Att’y Gen., to Heads of Dep’t Components & United States Att’ys 2 (Dec. 12, 2006) (stating that “certain crimes that carry with them a substantial risk of great public harm . . . are by their nature most likely to be committed by businesses”).

<sup>275</sup> Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 3–4 (2012) (emphasis added).

<sup>276</sup> *Id.* at 4.

<sup>277</sup> Larry D. Thompson, *The Blameless Corporation*, 47 AM. CRIM. L. REV. 1251, 1254 (2010).

judicial review would help protect the public interest, just as it does in the case of plea agreements<sup>278</sup> and consent agreements.<sup>279</sup>

Moreover, procedurally, the appeal in the *Fokker I* matter was somewhat unusual, with the Department of Justice and the Fokker company together on one side (both supporting approval of the DPA), versus the district court on the other side (obviously opposing DPA approval). It is unclear whether either the district court or the amicus curiae appointed by the appellate court (who advocated on behalf of the district court before the appellate tribunal)<sup>280</sup> had any legal or procedural rights to appeal the tribunal's ruling. If such an option was not available (or if it *was* available but was not pursued for whatever reason), does that suggest the public interest concerns in *Fokker I* have not yet been exhaustively addressed? After all, if the DOJ and the Fokker company had failed to prevail at the appellate court level, it seems likely they would have pursued the next available step for review—meaning they probably would have first requested a rehearing en banc, and if that avenue did not yield positive results they might have filed a petition for writ of certiorari with the Clerk of the U.S. Supreme Court. Does the fact that the district court and/or amicus did not (or for whatever reason could not) take such steps suggest a deficiency within the criminal justice system—especially with respect to adequately protecting the interests of the public when DPAs are used in corporate matters? Although this issue falls outside the scope of this Article, it is worthy of further investigation and consideration.

### *E. Standard of Review*

It is interesting to note that the specific reasons listed by the *Fokker I* court for denying the DPA might justify rejecting that DPA even under the very narrow standard of review that was created by *Fokker II*. The appellate court created the following standard: the district court is to determine whether the DPA is “geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act’s time constraints”<sup>281</sup> and

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<sup>278</sup> *Orthofix*, 956 F. Supp. 2d at 321; *see also* *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (“While ‘[t]he procedures of Rule 11 are largely for the protection of criminal defendants . . . Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.’” (quoting *United States v. Miller*, 772 F.2d 562, 563 (9th Cir. 1983))).

<sup>279</sup> *See* *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (“Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.”) (citations omitted); *S.E.C. v. Levine*, 881 F.2d 1165, 1181 (2d Cir. 1989) (“[W]hen the district judge is presented with a proposed consent judgment, he is not merely a ‘rubber stamp.’”).

<sup>280</sup> *Fokker II*, 818 F.3d 733, 740 (D.D.C. 2016) (“Because both parties seek to overturn the district court’s denial of their joint motion to exclude time, we appointed an amicus curiae to present arguments defending the district court’s action.”).

<sup>281</sup> *Id.* at 744.

therefore the district court will “confine[] its inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct.”<sup>282</sup>

Applying that standard to the *Fokker I* case, a district court would very likely conclude that the second part of the test (i.e., the proposed DPA did not appear to be a pretext for evading the Speedy Trial Act’s time constraints) is clearly met; nothing emerged in the record of the case to suggest a contrary conclusion.<sup>283</sup> However, a district court could easily determine that the first part of the test (i.e., that the agreement was geared to enabling the defendant to demonstrate compliance with the law) is *not* met because (1) the probationary period could be considered too short to accurately determine if the company is successfully on a path to real and long-term change and compliance, and (2) a monitor has not been put into place to verify to the government and to the court that the company is in fact achieving full compliance with all conditions of the DPA.<sup>284</sup>

Moreover, one might consider how easy it will be, in future cases, for a DPA agreement to meet the narrow standard of review that has been set forth by *Fokker II*. A plain reading of the standard suggests that a DPA filed with a district court would have to do nothing more than accomplish the following three goals: (1) institute “best practices” types of measures within the company to bring about compliance with the law; (2) provide a significant probationary period (say, three years) to allow enough time to assess whether the instituted changes are working; and (3) employ a monitor to verify that progress is in fact being made. In applying this standard to the original *Fokker I* DPA, if the agreement had included provisions to accomplish those three specific goals and nothing more—not even a fine or an acknowledgment of wrongdoing—the DPA would have successfully met the standard, and the district court would have been obligated, at least within the D.C. Circuit, to approve the DPA. Simply put, the standard of review created by *Fokker II* fails to sufficiently restrain government discretion in using corporate DPAs, resulting in the potentiality for future agreements to be unreasonable, unjust, or not within the rule of law.<sup>285</sup>

In *U.S. v. Brett Townsend*,<sup>286</sup> a money laundering case, after a request was made that the court approve the DPA pursuant to 18 U.S.C. § 3161(h)(2), the court concluded: “[a]fter an investigation of the offense and the defendant’s current health condition, it appears that the interests of the United States, Mr. Townsend’s interests, and the interests of justice will be served by the [DPA].”<sup>287</sup> Thus, in trying to determine what factors should form a standard of review in the approval process, the court places on the balance the court’s assessment of the interests of the United States, the defendant, and justice itself.<sup>288</sup>

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<sup>282</sup> *Id.* at 747.

<sup>283</sup> *Id.*

<sup>284</sup> *Fokker I*, 79 F. Supp. 3d. 160, 167 (D.D.C 2015).

<sup>285</sup> Arlen, *supra* note 26, at 192–93.

<sup>286</sup> No. 2:12-CR-0080 TLN, slip op., 2016 WL 5415411 (E.D. Cal. Sept. 27, 2016).

<sup>287</sup> Deferred Prosecution Agreement at ¶ 1, *United States v. Townsend*, No. 2:12-CR-0080 TLN (E.D. Cal. Sept. 27, 2016).

<sup>288</sup> *Id.*

This standard resembles the one advocated by Professor David Zaring in his article, “Rule by Reasonableness.”<sup>289</sup> Writing in the context of administrative law, Zaring’s following thoughts are equally applicable to the task of formulating a standard of review for DPA approval:

standards of review should be performing *some duty to the public*. They should be clarifying what agencies can do and what courts can do. It is not clear that this duty to the public is being met, as Chevron turns into an increasingly confusing part of an increasingly elaborate and confusing series of standards of review.<sup>290</sup>

Might such a standard—one that balances the interests of the public, the defendant, and respect for law more generally—work well when district courts review DPAs? Rather than attempt to create a standard that is complex and limited to “the province of obscure doctrinal geniuses[.]”<sup>291</sup> perhaps it would be more productive and fair to the public, to the parties, and to the courts to set forth a standard “that . . . really amounts to a fact-specific and context-sensitive *reasonableness* inquiry.”<sup>292</sup> A similar standard—one based on reasonableness and the weighing of potential harms to the various parties impacted by the ruling—appears to be employed by the court when deciding whether or not to approve a DPA in *U.S. v. WakeMed*,<sup>293</sup> where the court “consider[s] the equities at issue,”<sup>294</sup> including (1) “the impact of defendant’s actions on the primary victims in this matter[.]” including taxpayers and the Medicare program;<sup>295</sup> (2) “the protection of defendant’s employees and healthcare providers who are blameless but who would suffer severe consequences” if WakeMed were convicted;<sup>296</sup> and (3) “the threat that the provision of essential healthcare to WakeMed’s patients would be interrupted” if WakeMed were forced to close.<sup>297</sup> Thus, “after weighing the seriousness of defendant’s offense against the potential harm to innocent parties” if the prosecution were to move forward, the court decided to approve the DPA.<sup>298</sup>

In a similar vein, it is instructive to consider the standard of review that has historically been used in other kinds of cases where district courts must approve settlements—including those in the areas of class actions, shareholder derivative

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<sup>289</sup> David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 525–26 (2011).

<sup>290</sup> *Id.* at 559 (emphasis added).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* (emphasis added).

<sup>293</sup> No. 5:12–CR–398–BO, 2013 WL 501784 (E.D.N.C. Feb. 8, 2013).

<sup>294</sup> *Id.* at \*2.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*



suits, and compromises of claims in bankruptcy court.<sup>299</sup> For these three situations, district courts historically had to find the settlement to be “fair, adequate, and reasonable”<sup>300</sup> or had to find that the settlement terms were “not unlawful, unreasonable, or inequitable.”<sup>301</sup> Again, the thread running through all these standards is *reasonableness*—that a district court must attempt to consider and balance the reasonable interests of all parties, including the government, the defendant, and the general public.

Even more technical statutes addressing environmental and labor issues can involve approval standards that are grounded in reasonableness. For environmental clean-up consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), courts must ensure the settlement is “reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.”<sup>302</sup> For claim settlements under the Fair Labor Standards Act (“FLSA”), courts must ensure the settlement is a “fair and reasonable res[o]lution of a bona fide dispute over FLSA provisions.”<sup>303</sup> As courts continue to grapple with the important task of setting forth a standard of review for corporate DPAs, they would do well to turn to these ideas of balancing the reasonable interests of all parties involved.

## VI. CONCLUSION

Currently, federal prosecutors have too much unfettered power and discretion in employing DPAs in the context of alleged corporate misconduct. As Professor John Coffee warns regarding prosecutors and DPAs: “the deeper problem lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute power.”<sup>304</sup> Now the D.C. Circuit Court of Appeals, in a much anticipated case of first impression, decided in *Fokker II* that judicial review of corporate DPAs should be extremely narrow and limited. This Article argues that the appellate court decision subordinates public interest, undermines fundamental separation-of-power principles, and runs contrary to the dictates of both statutory language and legislative history surrounding DPAs.

The Article demonstrates that despite the holdings of the court in *Fokker II*, a district court, when considering whether or not to approve a DPA agreement, *is not* compelled to “confine[] its inquiry to examining whether the DPA served the

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<sup>299</sup> See *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980) (discussing the standard for approval in proposed class action settlements, proposed shareholder derivative suit settlements, and proposed compromises of claims in bankruptcy court).

<sup>300</sup> *Id.* (citations omitted).

<sup>301</sup> *Id.* (citation omitted).

<sup>302</sup> *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (quoting H.R. REP. NO. 253, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

<sup>303</sup> *Lynn’s Food Stores, Inc. v. United States ex rel. U.S. Dep’t of Labor*, 679 F.2d 1350, 1355 (11th Cir. 1982).

<sup>304</sup> John C. Coffee Jr., *Deferred Prosecution: Has it Gone Too Far?*, 27 NAT’L. L. J., July 25, 2005, at 13.

purpose of allowing [the defendant] to demonstrate its good conduct”<sup>305</sup> and is permitted to consider “the choices reflected in the agreement’s terms.”<sup>306</sup> Although district courts should never play a role in *crafting* DPAs, there are no separation of power concerns with those courts reviewing (under a reasonably comprehensive standard of review) DPA agreements to ensure adequate protection of the government’s interests, the defendant’s interests, the public’s interests, and overall respect for the law.<sup>307</sup> The Article also suggests that courts outside the D.C. Circuit, if faced with the same legal issues, can and should arrive at different conclusions—ones that empower district courts to conduct, during the DPA approval process, a more thorough and comprehensive review of the agreements.

It is instructive to consider the following parallel situation that unfolded approximately forty-five years ago: In 1973, the D.C. Circuit Court of Appeals ruled in *U.S. v. Ammidown*<sup>308</sup> that a district court must accept a plea agreement unless the deal is “such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.”<sup>309</sup> Commenting on that ruling, and going in a different direction, the U.S. Court of Appeals for the Fifth Circuit stated:

Although a prosecutor may have wide discretion in initiating prosecutions, once the aid of the court has been invoked the court cannot be expected to accept without question the prosecutor’s view of the public good. To our knowledge no other circuit has followed the District of Columbia in so drastically limiting the discretion of a judge in regard to plea bargains.<sup>310</sup>

Ideally, history will repeat itself with respect to the D.C. Circuit’s narrow and limiting ruling in *Fokker II*, and other courts will choose to move in another direction. The U.S. Congress, too, can play a role in redirecting the legal course on which corporate DPAs have now been set. Congress has done this in the past when the D.C. Circuit Court of Appeals issued an overly-narrow interpretation of a federal statute,<sup>311</sup> and it should see fit to take similar corrective action in this matter.

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<sup>305</sup> *Fokker II*, 818 F.3d 733, 747 (D.C. Cir. 2016).

<sup>306</sup> *Id.* at 744.

<sup>307</sup> Under Section 9-28.1100 of the Principles of Federal Prosecution of Business Organizations, addressing “Collateral Consequences,” the U.S. Attorneys’ Manual states that “[t]he appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department’s need to promote and ensure respect for the law.” Dep’t of Justice, United States Attorneys’ Manual § 9-28.1100 (1997), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.1100> [<https://perma.cc/Q8ZD-LB5W>].

<sup>308</sup> 497 F.2d 615 (D.C. Cir. 1973).

<sup>309</sup> *Id.* at 622.

<sup>310</sup> UNITED STATES V. BEAN, 564 F.2d 700, 703 N.4 (5TH CIR. 1977).

<sup>311</sup> In *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), the D.C. Circuit Court of Appeals interpreted provisions within the Antitrust Procedures and Penalties Act (commonly called the “Tunney Act”) that directed district courts to ensure that entry of consent decrees in civil antitrust cases filed by the DOJ would be in the public interest. When

A central holding in *Fokker II* is that DPA agreement provisions are in core respects functionally equivalent to charging decisions,<sup>312</sup> and are therefore insulated from judicial review due to “long-settled understandings about the independence of the Executive with regard to charging decisions.”<sup>313</sup> This Article demonstrates, however, that DPA provisions are in fact separate and distinct from charging decisions, and they should be subject to judicial control through reasonable review. In 1974, when pretrial diversion programs were first being introduced, a note was published in the Yale Law Journal that speaks eloquently to this issue. In a section entitled “Control of Discretion,” the note states, “[o]nce a prosecutor consents to the establishment of a pretrial diversion program, fairness and social policy would dictate that his discretion to divert, *unlike his discretion to prosecute prior to the establishment of the program, should be subject to judicial control.*”<sup>314</sup> The note goes on to state that pretrial diversion “is a *sentencing* activity by *nonjudicial* personnel” where “the accused is sentenced to a term of probation before trial.”<sup>315</sup> Thus, the note concludes,

[p]retrial diversion encroaches on judicial sentencing authority. Although there is no formal adjudication of guilt before sentence, most programs tend to proceed as if the accused is guilty in fact and in need of rehabilitation. Favorable termination, therefore, preempts the duty of the judge to adjudicate and sentence. It should be incumbent upon judges to claim responsibility for the diversion decision or, at least, to oversee the discretionary decisions of prosecutor and program staff.<sup>316</sup>

Thus, although *Fokker II* suggests that the Judiciary’s act of reviewing DPA agreement provisions during the approval process can encroach on Executive authority,<sup>317</sup> the Yale Law Journal piece suggests the exact opposite: that it is the *prosecutor* (or Executive) who, by functionally engaging in adjudication and

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the government’s motion to grant a decree was denied by the district court, the appellate court reversed and said that district courts should accept a decree unless “on its face and even after government explanation, [the decree] appears to make a mockery of judicial power.” *Id.* at 1462. Congress later made amendments to the Tunney Act, with statements in the Congressional record suggesting the appellate court’s “mockery of judicial power” language formed a review standard that was too narrow. 150 CONG. REC. S3615–18 (Apr. 2, 2004). One Senator stated the amendments would “insure that the courts can undertake meaningful and measured scrutiny of antitrust settlements.” *Id.* at S3617.

<sup>312</sup> *Fokker II*, 818 F.3d 733, 744 (D.C. Cir. 2016) (“As with conventional charging decisions, a DPA’s provisions manifest the Executive’s consideration of factors such as the strength of the government’s evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight.”).

<sup>313</sup> *Id.* at 738.

<sup>314</sup> Note, *supra* note 222, at 843 (emphasis added).

<sup>315</sup> *Id.* (emphasis added).

<sup>316</sup> *Id.* at 843–44.

<sup>317</sup> *Fokker II*, 818 F.3d at 743–44.

sentencing activities through pretrial diversion, is “preempt[ing] the duty of the judge” and thereby encroaching on the authority of the district court (or Judiciary).<sup>318</sup> Correspondingly, *Fokker II*, rather than deciding to permit the district court “to oversee the discretionary decisions of [the] prosecutor” via reasonable review powers during the DPA approval process,<sup>319</sup> instead decided to severely limit those review powers, thereby preventing a much needed balancing of power. Moreover, adjudication and sentencing might be just the *beginning* of activities prosecutors engage in (and encroach upon) when using DPAs: most corporate DPAs are made up of the functional equivalents of a guilty plea, conviction, sentence, and probation—all in one single agreement.<sup>320</sup> And the prosecutor controls every facet of that agreement and its implementation, including exclusive power in determining if the agreement has been breached by the defendant.<sup>321</sup>

It is now time for the courts, and Congress, to take corrective action. Two federal court judges have already called for Congress to take action with respect to DPAs—one did so prior to the *Fokker II* ruling<sup>322</sup> and one did so afterward.<sup>323</sup> Notwithstanding the *Fokker II* decision, it is important that future courts be provided, either through legislation<sup>324</sup> or through evolving case law, with meaningful review powers over corporate DPAs, including the ability to reject agreements that are too harsh, too lenient, or that fail to conform to the rule of law.<sup>325</sup>

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<sup>318</sup> Note, *supra* note 222, at 843–44.

<sup>319</sup> *Id.*

<sup>320</sup> See Breuer, *supra* note 9 (“[I]n many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea.”); Rush et al., *supra* note 5, at 1–3 (suggesting that DPA agreements basically amount to a guilty plea, a conviction, and a probationary period for the defendant); *Hearing*, *supra* note 219, at 5 (suggesting that DPAs give prosecutors “unmitigated power to be judge, jury and sentencer” (emphasis added)).

<sup>321</sup> See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14 (2007) (“Although negotiated resolutions offer enormous economic benefit, the omission of judicial oversight raises concerns when the determination of whether there is a breach of the agreement rests within the exclusive province of one party, and that party is the government, a party with extraordinary power.”).

<sup>322</sup> *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 n.9 (D.D.C. 2015) (“[C]ongressional action to clarify the standards a court should apply when confronted with a corporate deferred-prosecution agreement may be appropriate.”).

<sup>323</sup> Judge Rosemary Pooler wrote, “I respectfully suggest it is time for Congress to consider implementing legislation providing for [meaningful court oversight of DPAs].” *United States v. HSBC Bank USA, N.A. (HSBC II)*, 863 F.3d 125, 143 (2d Cir. 2017) (Pooler, J., concurring).

<sup>324</sup> Starting in 2009, Congress has proposed, multiple times, legislation that would ensure judicial review of the approval, implementation, and termination processes for DPAs, however, the bill—entitled *The Accountability in Deferred Prosecution Act* (“ADPA”)—has never been enacted into law. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009).

<sup>325</sup> Arlen, *supra* note 26, at 192–93.

Of these two possibilities to remedy the current situation—correction through developing case law from the courts, or correction through legislative reform from Congress—it is more likely to be *Congress* that will act to make the necessary changes. As for development of case law, core holdings of *Fokker II* have already been adopted by another federal circuit. In *U.S. v. HSBC Bank USA, N.A.*,<sup>326</sup> the U.S. Court of Appeals for the Second Circuit focused on matters concerning DPA *implementation* (as opposed to *approval*) processes.<sup>327</sup> In its opinion, the court made clear that it fully agreed with the court’s ruling and reasoning in *Fokker II* regarding DPA approval.<sup>328</sup> Indeed, the court stated that district courts should be limited to the following specific and highly circumscribed role during the approval and implementation of corporate DPAs: “Absent unusual circumstances not present here, a district court’s role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise.”<sup>329</sup>

Moreover, given that the *Fokker* appellate decision was a matter of first impression, that court’s interpretation of the relevant statute—18 U.S.C. § 3161(h)(2)—will likely continue to have substantial influence on future courts and opinions, just as it did on the U.S. Court of Appeals for the Second Circuit and its recent *HSBC* decision. As one scholar explains, “when it comes to reexamining judicial interpretations of statutes, courts tend to be extremely deferential to established prior constructions. In fact, the general rule is that judicial interpretations of statutes, once rendered, enjoy heightened *stare decisis* effect, sometimes referred to as a ‘super-strong’ presumption of correctness.”<sup>330</sup>

Under the *Fokker* appellate court ruling, corporate DPAs are permitted to engender a troubling usurpation by the Executive of wide-ranging power that needs to be checked and balanced by the Judiciary.<sup>331</sup> As Judge Rosemary S. Pooler notes in her concurring opinion of the recent *HSBC* appellate court decision: “[a]s the law governing DPAs stands now, . . . the prosecution exercises the *core judicial functions* of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.”<sup>332</sup> And as Professor Richard Epstein cautions, DPA agreements can “turn[] the prosecutor into judge and jury, thus undermining our principles of separation of

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<sup>326</sup> *HSBC II*, 863 F.3d at 129.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1828 (2015).

<sup>331</sup> *But see HSBC II*, in which the appellate court states that it agrees with the *Fokker* appellate court’s interpretation of 18 U.S.C. § 3161 (h)(2) and that “such an interpretation accords with the *ordinary distribution of power between the judiciary and the Executive* in the realm of criminal prosecution.” *HSBC II*, 863 F.3d at 138 (emphasis added) (citation omitted).

<sup>332</sup> *Id.* at 143 (Pooler, J., concurring) (emphasis added).

powers.”<sup>333</sup> Despite the development of corporate DPA law and policy in its current, ill-advised direction, I am nonetheless hopeful that other courts, or Congress, will soon redirect that course of development, resulting in an all-important rebalancing of power between the Executive and Judiciary as it pertains to corporate DPAs.

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<sup>333</sup> Richard A. Epstein, Commentary, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14.